Supreme Court, U.S.
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# In The
# Supreme Court of the United States

JERRY CHARLES VAUGHAN,

*Petitioner,*

v.

FRED LAWRENCE COX, OFFICER, Individually and in his official capacity as an Officer of the Coweta County Sheriff's Department, COWETA COUNTY, GEORGIA, MIKE YEAGER, SHERIFF, in his official capacity as Sheriff of Coweta County,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

1. Whether, despite this Court's guidance in *Hope v. Pelzer*, the Eleventh Circuit has continued to ignore this Court's determination in *United States v. Lanier* that "general statements of the law are not inherently incapable of giving fair and clear warning" when they apply with "obvious clarity" to the facts of a given case, and has continued to apply an overly rigid approach to the qualified immunity analysis.

2. Whether decisional law gave law enforcement officers "fair notice" that shooting to kill, without warning, an unarmed fleeing non-violent felony suspect solely because that suspect was speeding at ten to fifteen miles per hour over the speed limit to elude capture, violated the suspect's Fourth Amendment rights thereby precluding qualified immunity.

3. Whether the requirement of *Tennessee v. Garner* to give a warning "where feasible" before use of deadly force is null and void for lack of factual specificity as it applies to qualified immunity as declared by the Eleventh Circuit.

4. Whether it is improper for a Court to completely ignore local, state, and national standards of police procedure in the qualified immunity analysis involving law enforcement when determining what law is clearly established and provides "fair notice" that certain actions are unconstitutional.

## LIST OF PARTIES

The caption contains the names of all parties to the proceeding which are as follows:

JERRY CHARLES VAUGHAN
FRED LAWRENCE COX
MIKE YEAGER
COWETA COUNTY, GEORGIA

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| LIST OF PARTIES | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF AUTHORITIES | v |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| PRIMARY CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE | 1 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE WRIT | 10 |
| A. The Eleventh Circuit Court of Appeals continues to apply an improperly rigid analysis to qualified immunity contrary to this Court's holding in *Hope* and *Lanier*. This is an issue of extreme importance which should be settled by this Court | 10 |
| B. The Eleventh Circuit has decided an issue of federal law of great importance which appears to be one of first impression that should be settled by this Court: whether the requirement in *Tennessee v. Garner* that a warning be given, where feasible, before the use of deadly force, is incapable of providing fair notice to state actors of when a warning is necessary during pursuit of a fleeing suspect | 16 |
| C. The Eleventh Circuit decision below is inconsistent with other federal appellate court decisions in this area of the law | 19 |

TABLE OF CONTENTS – Continued

Page

D. The Writ should be granted in this case because it involves an issue of great importance of whether in ruling on qualified immunity a Court can completely ignore the existence of local, state and nationally recognized standards of police procedure in ruling, as a matter of law, that an officer did not have "fair notice" that his actions violated constitutional rights, and clarification is needed to further define "fair notice" pursuant to *Hope* and *Lanier* ..... 24

CONCLUSION ..... 26

APPENDIX ..... App. 1

## TABLE OF AUTHORITIES

Page

CASES

*Acoff v. Abston,* 762 F.2d 1543 (11th Cir. 1985).....24

*Anderson v. Creighton,* 483 U.S. 635, 98 L. Ed. 2d 523, 107 S. Ct. 3034 (1987).....16

*Anderson v. Liberty Lobby,* 477 U.S. 242 (1986).....23

*Barlow v. Ground,* 943 F.2d 1132 (9th Cir. 1991), *cert. denied,* 120 L. Ed. 2d 872, 112 S. Ct. 2995 (1992).....23

*Bray v. County of San Diego,* 1994 U.S. App. LEXIS 4289 (9th Cir. 1994).....21

*Deorle v. Rutherford,* 272 F.3d 1272 (9th Cir. 2001).....20

*Dixon v. Richer,* 922 F.2d 1456 (10th Cir. 1991).....23

*Estate of Starks v. Enyart,* 5 F.3d 230 (7th Cir. 1993).....19

*Graham v. Conner,* 490 U.S. 386 (1989).....24, 25

*Harris v. Roderick,* 126 F.3d 1189 (9th Cir. 1997), *cert. denied,* 1522 U.S. 1115 (1998).....21

*Hope v. Pelzer* 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002).....*passim*

*McCaslin v. Wilkins,* 183 F.3d 775 (8th Cir. 1999).....19

*Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).....

*Owen v. City of Independence,* 445 U.S. 622 (1980).....14

*Posr v. Doherty,* 944 F.2d 91 (2nd Cir. 1991).....23

*Perrin v. Genter,* 2001 U.S. Dist. LEXIS 21221 (D. Nev. 2001).....22

TABLE OF AUTHORITIES – Continued

Page

*Rosales v. City of Phoenix,* 25 Fed. Appx. 582, 2001 U.S. App. LEXIS 27599 (9th Cir. 2001) ..... 21

*Saucier v. Katz,* 533 U.S. 194, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001) ..... 8, 20

*Tennessee v. Garner,* 471 U.S. 1, 85 L. Ed. 2d 1, 105 S. Ct. 1694 (1985) ..... *passim*

*Thomas v. Roberts,* 2003 U.S. App. LEXIS 4143 (11th Cir. March 10, 2003) ..... 11, 15, 16

*United States v. Bradley*, 196 F.3d 762 (7th Cir. 1999) ..... 19

*U.S. v. Lanier,* 520 U.S. 259, 137 L. Ed. 2d 432, 117 S. Ct. 1219 (1997) ..... 10, 26

*Vaughan v. Cox,* 264 F.3d 1027 (11th Cir. 2001), *vacated and remanded by* 122 S. Ct. 2653 (June 28, 2002) ..... *passim*

*Vaughan v. Cox,* 316 F.3d 1210 (11th Cir. 2003), 2003 U.S. App. Lexis 47 ..... *passim*

*Willingham v. Loughman,* 2003 U.S. LEXIS 2928 (11th Cir. Feb. 18, 2003) ..... 11, 16

*Wilson v. City of Des Moines, Iowa*, 297 F.3d 447, 2002 U.S. App. LEXIS 11087 (June 7, 2002, 8th Cir.) ..... 20

*Wilson v. Layne*, 526 U.S. 603 (1999) ..... 23

STATUTES

28 U.S.C. § 1331 ..... 10

28 U.S.C. § 1343 ..... 10

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 1983.....2, 10, 13

42 U.S.C. § 1988.....10

## OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit on Remand from the Supreme Court of the United States, was reported as follows:

> *Jerry Charles Vaughan, Plaintiff-Appellee v. Fred Lawrence Cox, Officer, Individually and in his official capacity as an officer of The Coweta County Sheriff's Department, Coweta County, Georgia, et al., Defendants-Appellees*, 316 F.3d 1210 (11th Cir. 2003), 2003 U.S. App. LEXIS 42.

The opinion was entered in the Eleventh Circuit Court of Appeals on January 3, 2003.

## JURISDICTION

The Judgment of the Court of Appeals sought to be reviewed was entered on January 3, 2003 (one Judge dissenting). This Court has discretionary jurisdiction over this cause by virtue of 28 U.S.C. § 1254(1).

## PRIMARY CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The relevant constitutional provisions involved are:

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant statutes involved are:

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

On January 5, 1998 at approximately 7:30 a.m., while travelling toward Atlanta on I-85, Plaintiff Jerry Vaughan,

age 19, was rendered a paraplegic when Defendant Cox, a deputy for the Coweta County Sheriff's Department, opened fire at the pickup truck in which Vaughan was a passenger. (R1-17, Vaughan depo. pp. 65-69; Cox depo. pp. 39-42). Vaughan was suspected of stealing the truck (R1-17, Cox depo. p. 40; R1-17, Looney depo. pp. 7-8).

Cox decided that the passenger of the suspect vehicle matched the description of the person that they were looking for and he decided to stop the vehicle by use of a "rolling roadblock" procedure prior to using blue lights. (R1-17, Looney depo. pp. 7-10; Cox depo. pp. 39-40; Vaughan depo. p. 69) The vehicles were all travelling at approximately the posted speed limit, sixty-five to seventy miles per hour with the normal flow of traffic, and the driver of the vehicle in which Plaintiff was a passenger was observing all traffic laws. (R1-17, Looney depo. pp. 6-10).

Cox then positioned himself directly in front of the truck, while Deputy Looney positioned himself directly behind the truck. (R1-17, Cox depo. pp. 39-41; Looney depo. pp. 8-10). When Cox hit the brakes to perform a rolling roadblock, this caused an unavoidable bump between the patrol car and the pickup truck. (R1-17, Vaughan depo. pp. 69, 72, 76; R2-28, Rayson aff. para. 6). Only after that point did Cox and Looney activate their blue lights. (R1-17, Vaughan depo. pp. 69, 72, 76; R2-28, Rayson aff. para. 8; R2-21, Looney report, Plaintiff's exh. 5).

Plaintiff Vaughan then put his hands out of the passenger window to signify that he had surrendered. (R1-17, Vaughan depo. p. 84). Cox, Looney, and Deputy Donna Gordon saw Plaintiff put his hands out of the passenger

side window (R1-17, Cox depo. p. 43; Looney depo. p. 29; Gordon report, Plaintiff's exh. 6). As part of the radio transmission, Cox states that the "vehicle is going northbound. He also hit me in the rear, and they act like they want to slow down, he's got his hands out the window." (R2-21, Plaintiff's exh. 10; R2-21, Plaintiff's exh. 5).

At approximately the same time, Cox dropped back on the left side of the truck, lowered his passenger side window, unholstered his 9mm Glock, and fired three shots into the driver's side of the suspect truck. (R1-17, Vaughan depo. pp. 69, 81-82; Cox depo. p. 42). The last of these three shots entered the truck and struck Vaughan in the spine, paralyzing him instantly from the chest down (R1-17, Vaughan depo. pp. 28, 69-71). Cox pulled his cruiser parallel to the truck, turned his rooftop lights on and waited for thirty to forty-five seconds before firing his weapon. (R1-17, Vaughan depo. pp. 69, 82).

At the time of the initial shooting, other than the bump caused when Cox hit his brakes, there was no contact, or attempted contact by the truck with any other vehicles, and the truck never attempted to strike Cox. (R1-17, Vaughan depo. pp. 77-83; R2-28, Rayson aff. para. 11).

The pursuit then continued in a more dangerous manner with another round of shots being fired by Cox. The suspect vehicle eventually struck a concrete guardrail. (R1-17, Vaughan depo. pp. 70-71).

In regard to the firing of shots at Jerry Vaughan, when asked "were you trying to hit the driver?", Cox responded "yes", as to both series. (R1-17, Cox depo. p. 52). When asked if he had considered the consequence of a bullet striking a passenger, he responded "I considered the passenger the same as the driver." (R1-17, Cox depo. p.

54). Cox stated that if he had hit the driver, he would have taken his patrol car from the left lane, pushed the pickup truck, along with the trailer with personal watercraft, in heavy traffic, across the interstate and off the road. (R1-17, Cox depo. p. 53). This was a maneuver for which he had not received any training, but had only seen on television. (R1-17, Cox depo. pp. 53-54).

*The Georgia Peace Officers Standard and Training Council Handbook* states that Officers should not fire at other vehicles from their vehicles while in high speed pursuit. (R2-21, Plaintiff's exh. 3, p. 7.2-9). The handbook also states that "it is not recommended for an officer to fire at a vehicle coming at him, and that an officer is not legally justified in firing at a vehicle which passes him." (R2-21, Plaintiff's exh. 3, p. 7.2-9). These Georgia standards have been nationally recognized in the law enforcement profession since at least 1982. (R2-25, White depo. 1/5/00, pp. 11, 45, 63, 87; White depo. 1/7/00, pp. 6, 92, 94; R2-28, Keller aff. para. 8, App. 55-62). The shooting of Jerry Vaughan by Defendant Cox was a violation of well-established "written" Coweta County department policy, as well as established standards of law enforcement procedures recognized both in Georgia and nationally. (R2-28, Keller aff. para. 8, App. 55-62).

Standards for Police Procedures found in the training keys for the International Association of Chiefs of Police also discourage high speed pursuits in the circumstances of this case (R2-21, IACP Training Key 499) and state "officers should not discharge a firearm at or from a moving vehicle except as the ultimate measure of self defense or defense of another person when the suspect is using deadly force *by means other than the vehicle.*" (R2-21, IACP Training Key 325) (Emphasis added).

Coweta County Use of Force Policy states that "all reasonable means shall be employed before escalating to more severe force." (R2-21, Plaintiff's exh. 4, p. 80). Deadly force used for self-defense is only authorized when the deputy reasonably believes the force is necessary to defend his own life or the life of another and that all other available means of defense have failed or would be inadequate or dangerous. (R2-21, Plaintiff's exh. 4, p. 81). Said policies further state that "deliberate physical contact between vehicles at any time will not be justified" (although someone has later written in the word "may"). (R2-21, Plaintiff's exh. 4, p. 92). Said policy further states that "because of the potential danger involved, the pursuing deputy shall not pull along side a fleeing motorist in an attempt to force him into a ditch, curb, parked car, or other obstacles." (R2-21, Plaintiff's exh. 4, p. 92) (Emphasis added).

Cox had been informed by the previous Sheriff's administration that shots should not be fired at a moving vehicle from a moving vehicle, but he did not feel that standard applied to him in this particular case. (R1-17, Cox depo. p. 57).

A car is not to be considered a deadly weapon justifying the use of deadly force when the officer is also in a car. (R2-28, Keller aff. para. 8, App. 55-62; R1-17, IACP Training Key 325, Plaintiff's exh. 2). Incidental contact between vehicles cannot be used as justification for use of deadly force. (R2-28, Keller aff. para. 8, App. 55-61). Retired State Patrol Officer Vandiver Keller, one of Plaintiff's experts, presented his affidavit that the shooting of Jerry Vaughan was not justified because Vaughan offered no true, or reasonably perceived threat of deadly force to Cox or anyone else prior to the shooting and Defendant Cox's own

actions of creating an unreasonable risk of danger to himself cannot be used as justification for use of deadly force (R2-28, Keller aff. para. 8, App. 55-61).

Despite these longstanding nationally recognized standards, Defendant Cox had fired his weapon from his moving vehicle into another moving vehicle with unarmed passengers involved, during high speed pursuit, in September, 1997, just four months prior to the shooting at issue. (R1-17, Cox depo. pp. 32-34; Yeager depo. p. 31) Cox had conducted a high speed pursuit through a heavily populated area, and, when the pursuit reached a rural area, Cox fired his gun into the back of the pursued pickup truck, striking the passenger in the arm. The truck was being pursued for a suspected burglary. (R1-17, Cox depo. pp. 32-34; Yeager depo. pp. 30-31)

In addition to opinions from two experts for Plaintiff stating Defendant Cox's actions were improper and that he should have known they were improper, the expert for Defendants, P.O.S.T. Firearms Instructor Ernie Tobin, stated that if one accepted the version of the facts set forth by Plaintiff and the driver of the truck, then Defendant Cox's actions would not have been justified. (R2-26, Tobin depo. pp. 41-42). Plaintiff's expert, Vandiver Keller, is a recently retired twenty-five year veteran of the Georgia State Patrol who worked as a patrol officer and who taught "Tactical Firearms" for the State Patrol for fourteen years and "Officer Survival" for five years, among many other credentials. He opined that the local, state, and national standards of police procedure made clear that the law was clearly established that Cox should have known shooting in these circumstances was highly improper. (R2-28, Keller aff., App. 52-62).

This Court vacated the original opinion granting qualified immunity in this case and remanded for further consideration in light of *Hope v. Pelzer* 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002). On remand, the Eleventh Circuit Court of Appeals reinstated its prior opinion in full (*Vaughan v. Cox,* 316 F.3d 1210, 2003 U.S. App. LEXIS 42), holding that the shooting did constitute a seizure, and that a reasonable jury could find both that the shooting was unreasonable and that it would have been feasible for Cox to give a warning before using deadly force. *Vaughan*, 264 F.3d 1027, App. 19-21.[1] However, citing *Saucier v. Katz*, 533 U.S. 194, 150 L. Ed. 2d 272, 121 S. Ct. 2151, 2158 (2001), the panel (with one Judge dissenting, Hon. John T. Noonan, Jr., U.S. Circuit Judge for the Ninth Circuit, sitting by designation) held that:

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[1] " . . . [W]e conclude that a reasonable jury could find that Deputy Cox acted unreasonably in firing at the pickup. First, material issues of fact remain as to whether Vaughan and Rayson's continued escape presented an immediate threat of a serious harm to Cox or others. Assuming Vaughan's version of events, it is not clear that Looney or Cox were in immediate danger from the suspects at the time of the shooting, nor does the record reflect that the suspects had or were likely to menace other innocent drivers. What Deputy Cox was faced with at the time he fired his weapon was simply two suspects who were evading arrest and had accelerated to eighty or eighty-five miles per hour in an attempt to avoid capture. Under such facts, a reasonable jury could find that Vaughan and Rayson's escape did not present an immediate threat of serious harm to Cox or others on the road." *Vaughan,* 264 F.3d 1027, App. 19-20. "Second, a reasonable jury could find that it was feasible for Cox to warn the trucks occupants of the potential application of deadly force. . . . a reasonable jury could therefore conclude that Cox had the time and opportunity to warn Vaughan and Rayson that he was planning to use deadly force before he opened fire." *Vaughan,* 264 F.3d 1027, App. 20.

> a reasonable officer in Deputy Cox's position could have believed that he had sufficient probable cause to apply deadly force. At the time he fired his weapon, Cox had clearly demonstrated to the truck's occupants that he wanted them to stop and had seen the driver instead speed up to avoid apprehension. A reasonable officer in Cox's position could have concluded that the suspects, who were fleeing down a major highway at approximately eighty to eighty-five miles per hour in a pickup towing a trailer laden with two personal watercraft were not about to stop, posed a serious threat of harm to other motorists.

*Vaughan v. Cox*, 264 F.3d 1027, 1036 (11th Cir. 2001), App. 23.

Although they had already held that a reasonable jury could find that a warning before use of deadly force was feasible, the majority stated that:

> the law was not sufficiently established . . . that Defendant Cox knew that he needed to warn the occupants of the truck before firing his weapon. . . . As noted above, the Supreme Court has held that a police officer must warn a suspect of the potential application of deadly force 'where feasible.' See *Garner*, 471 U.S. at 11-12, 105 S. Ct. at 1701. However, aside from establishing a broad mandate to provide some form of warning, the Garner Court made no effort to define under what factual situations such a warning would be necessary. Nor has the Supreme Court, this Court or the Supreme Court of Georgia held that a warning was necessary in factual circumstances similar to those in this case. In short, the law was not defined in such a concrete way that a reasonable officer in Deputy Cox's position

> would have been compelled to conclude that it was unconstitutional to fire his weapon without first warning Vaughan and Rayson. Accordingly we affirmed the district court's grant of summary judgment to Deputy Cox because he is protected by qualified immunity.

*Vaughan* at 1036, 1037, App. 23-24.

This action was brought pursuant to 42 U.S.C. § 1983, 1988 (1984) to redress the deprivation, under color of law, of rights secured by the Fourth and Fourteenth Amendments to the United States Constitution. Jurisdiction in the lower court was proper pursuant to 28 U.S.C. §§ 1343 and 1331 (1984).

## REASONS FOR GRANTING THE WRIT

### A. The Eleventh Circuit Court of Appeals continues to apply an improperly rigid analysis to qualified immunity contrary to this Court's holding in *Hope* and *Lanier*. This is an issue of extreme importance which should be settled by this Court.

In ruling on qualified immunity, *Hope* rejected the notion that materially similar facts are required in determining if law is "clearly established." All that is required for law to be "clearly established" is that the officer have "fair warning" or "fair notice" that his actions would violate constitutional rights. *United States v. Lanier*, 520 U.S. 259, 137 L. Ed. 2d 432, 117 S. Ct. 1219. While a high degree of factual particularity may be required in some instances, fair and clear notice may be provided by a general constitutional rule identified in the decisional law

that applies with obvious clarity to the specific conduct in question, "even though the very action in question has [not] previously been held unlawful." *Hope*, 36 U.S. 730, 122 S. Ct. 2508, 2515-2516 (*citations omitted*).

Despite this Court's very clear directive in *Hope v. Pelzer*, the Eleventh Circuit continues to *require* cases with materially similar facts to avoid qualified immunity by simply stating that the general rule at issue does not apply with obvious clarity to the case at hand (e.g. *Vaughan v. Cox*, 316 F.3d 1210, 2003 U.S. App. LEXIS 42, App. 1; *Willingham v. Loughnan*, 2003 U.S. LEXIS 2928 (11th Cir. Feb. 18, 2003); *Thomas v. Roberts*, 2003 U.S. App. LEXIS 4143 (11th Cir. March 10, 2003)). Despite the order of remand from this Court, the Eleventh Circuit reinstated its prior opinion in its entirety in this case and continued to hold that an officer could have a reasonable belief that he was justified in using deadly force when shooting to kill without warning, an unarmed fleeing, non-violent felony suspect, solely because that suspect was speeding at ten to fifteen miles per hour over the speed limit to elude capture. At the time he fired his weapon, the deputy was faced merely with two theft suspects who were simply evading arrest, and who had accelerated to eighty or eighty-five miles per hour in an attempt to avoid capture. *Vaughan*, 316 F.3d 1210 (dissent), App. 8, and *Vaughan*, 264 F.3d 1027, App. 20, 23.

The court had already held that a reasonable jury could find that a warning, as required by *Tennessee v. Garner*, 471 U.S. 1, 85 L. Ed. 2d 1, 105 S. Ct. 1694 (1985), was feasible, and that Vaughan and the driver did not present immediate danger to Defendant Cox or others. *Vaughan*, 264 F.3d at 1036, 1037, App. 19.

The Court justified its opinion by stating that because the trailer-towing truck appeared to be speeding up from the speed limit to approximately eighty to eighty-five miles per hour down a major highway, that a reasonable officer in Deputy Cox's position could have believed that he had sufficient probable cause to use deadly force. *Vaughan,* 264 F.3d at 1036, 1037, App. 24. (despite the fact that his actions violated Coweta County written policy, Georgia P.O.S.T. Standards and long-standing national standards of police procedure).

Under this line of reasoning, officers would be reasonable in believing that they were justified in shooting to kill, without warning, any motorist on a major highway fleeing to elude capture who is speeding simply because speeding on a major highway is dangerous. It should be glaringly obvious that this is not constitutionally correct after the general constitutional rules and specific guidelines for use of deadly force enumerated in *Tennessee v. Garner.*

Precedent precisely on point is unnecessary. Perfect accuracy is not required. Common sense is relevant to the inquiry about whether the contours of the right at issue were clearly established. Fair warning is all that is required. *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002). The Eleventh Circuit's holding in this case (and indeed, its continued holding in other cases as well), effectively reads common sense out of the analysis.

Further, the Eleventh Circuit's holding provides no guidance to determine if future shootings at unarmed, fleeing, non-violent suspects, simply because they were speeding to elude capture, would be a violation of civil rights in the Eleventh Circuit. Without providing guidance

of any precedential value on that issue, the court holds that an officer in Cox's position could have had a reasonable belief that he was justified in shooting to kill without warning because driving eighty to eighty-five miles per hour could be construed as being dangerous to other motorists.[2]

The Eleventh Circuit's approach is contrary to the generous interpretation that was intended for 42 U.S.C. § 1983 to further its primary purpose of preserving human liberty and human rights and to provide remedies for their wrongs to all people.

> Moreover, Congressional debates surrounding the passage of § 1 of the Civil Rights Act of 1871, 17 Stat. 13 – the forerunner of § 1983 – confirmed the expansive sweep of the statutory [445 U.S. 636] language. Representative Shellabarger, the author and manager of the Bill in the House, explained in his introductory remarks the breadth of construction that the act was to receive:
>
> > I have a single remark to make in regard to the rule of interpretation of those provisions of the Constitution under which

[2] This "justification" for a qualified immunity holding in this case is fiction because the officer stated, contrary to the suspect driver and the plaintiff passenger, that the sole reason he fired was because the vehicle swerved at him creating a "combat situation." (R1-17, Cox depo. p. 26, 42). Cox would never have been next to the suspect trying to ram if off the road had he followed proper procedure, and if he really feared for his life, he would not hve pulled alongside the vehicle and put himself in danger two more times. He stated he only had his weapon out for protection in case they had a weapon. (R1-17, Cox depo. p. 42). The excuse of danger to other motorists was fabricated by defense counsel and unjustifiably followed by the Eleventh Circuit.

> all the sections of the Bill are framed. This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provision authorizing such statutes are liberally and beneficially construed. It would be most strange and, in civilized law, monstrous, were this not the rule of interpretation. As has been gain and again decided by your own Supreme Court of the United States, and everywhere else here there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people.
>
> *Globe*, 42d Cong., 1st Sess., App. 68 (1871) (hereinafter Globe App.) Similar views of the acts broad remedy for violations of Federally protected rights were voiced by its supporters in both houses of Congress. *See, Monell v. New York City Dept. of Social Services*, 436 U.S. @ 683-687.

*Owen v. City of Independence*, 445 U.S. 622, 635-636 (1980).

Despite the admonition by this Court for the Eleventh Circuit to remove its "rigid gloss" on the qualified immunity analysis and to apply a common sense "fair notice" approach to determining what law is "clearly established", the Eleventh Circuit has refused to do so. The Court continues to hold that prior decisional law, including *Tennessee v. Garner*, does not provide sufficient notice that shooting without warning, an unarmed fleeing felon,

speeding to elude, is unconstitutional.[3] This is an issue of tremendous impact and should be resolved by this Court.

[3] See also *Thomas v. Roberts*, 2003 U.S. App. LEXIS 4143 (11th Cir. March 10, 2003), which was similarly remanded by this Court for further consideration in light of *Hope v. Pelzer*. In that case, the Court held that *Hope* did not change the outcome of that case and they reinstated their prior decision in its entirety, holding that there is no case law prior to October 1995 that would have fairly and clearly warned Defendants that a mass "strip search" of elementary school students where an envelope containing twenty-six dollars disappeared from a teacher's desk, and there was no particularized suspicion, was unconstitutional. "As this Court has noted, where the applicable legal standard is a highly general one, such as "reasonableness," pre-existing case law that has applied general law to specific circumstances will almost always be necessary to draw a line that is capable of giving fair and clear notice that an official's conduct will violate federal law. (citations omitted)" and *Willingham v. Loughman*, 2003 U.S. App. 2928 (11th Cir. Feb. 18, 2003), also remanded for further consideration by this Court in light of *Hope v. Pelzer* wherein the court announced "the Supreme Court decision in *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d, 666 (2002), did not change the preexisting law of the Eleventh Circuit much. So, the result in this case which is a case that has been remanded to us from the Supreme Court for reconsideration in light of *Hope*, remains the same." "In many – if not most – instances, the apparency of an unlawful action will be established by (if it can be established at all) pre-existing case law which is sufficiently similar in facts to the facts confronting an officer. . . . " *Willingham*, 2003 U.S. App. 2928.

**B. The Eleventh Circuit has decided an issue of federal law of great importance which appears to be one of first impression that should be settled by this Court: whether the requirement in *Tennessee v. Garner* that a warning be given, where feasible, before the use of deadly force, is incapable of providing fair notice to state actors of when a warning is necessary during pursuit of a fleeing suspect.**

In dealing with fleeing suspects, the criteria for judging the reasonableness of use of deadly force by law enforcement has been that "deadly force may be used if necessary to prevent escape, . . . if the suspect threatens the officer with a weapon, or there is probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm . . . and if, where feasible, some warning has been given." *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S. Ct. 1694, 1701 (1985).

Despite the teachings of *Hope v. Pelzer,* the Eleventh Circuit has continued to interpret language from *Anderson v. Creighton*, 483 U.S. 635, 98 L. Ed. 2d 523, 107 S. Ct. 3034 (1987) to require that there be a factually substantially similar case predating the conduct in question in order to make that law clearly established as to the facts at hand. *See, Vaughan*, 316 F.3d 1210, App. 5, 6; *Willingham v. Loughnan*, 2003 U.S. App. LEXIS 2928 (11th Cir. Feb. 18, 2003); *Thomas v. Roberts*, 2003 U.S. App. LEXIS 4143 (11th Cir. March 10, 2003).

In the original Eleventh Circuit opinion, after acknowledging the "where feasible" warning requirement of *Garner*, the Court states that:

> aside from establishing a broad mandate to provide some form of warning, the *Garner* Court made no effort to define under what factual situations such a warning would be necessary. Nor has the Supreme Court, this court, or the Supreme Court of Georgia held that a warning was necessary in factual circumstances similar to those in this case. (citations omitted). In short, the law was not defined in such a concrete way that a reasonable officer in Deputy Cox's position would have been compelled to conclude that it was unconstitutional to fire his weapon without first warning Vaughan and Rayson.

*Vaughan*, 264 F.3d at 1037, App. 24.

This holding was made after the Court stated that:

> A reasonable jury could find that it was feasible for Cox to warn the truck's occupants to the potential application of deadly force. According to Vaughan's version of events, Cox pulled his cruiser parallel to the truck, turned his rooftop lights on, and waited for thirty to forty-five seconds before firing his weapon. A reasonable jury could therefore conclude that Cox had the time and opportunity to warn Vaughan and Rayson that he was planning to use deadly force before he opened fire.

*Vaughan*, 264 F.3d at 1035, App. 10-12.

These holdings were reinstated in their entirety by the majority in *Vaughan,* 316 F.3d 1210, App. 7.

The adequacy of the "where feasible" language of the *Garner* holding in regard to providing law that is "clearly established" has never been before this Court. Given the

tremendous reliance upon this case in applying constitutional law in federal and state courts across this country, this issue is of immediate and utmost importance.

If the Eleventh Circuit ruling is allowed to stand without final settlement of this issue by this Court, the holding in *Vaughan* will likely open up a whole "new can of worms" in the use of deadly force. Requiring the "where feasible" warning language to be specifically factually defined before it can create "clearly established law" would nullify the warning requirement mandated by *Garner* as well as the holding in *Hope*.

In its latest opinion in this case, the Eleventh Circuit acknowledges the standards set forth in *Garner*, then concludes that the specific rule for using deadly force on a fleeting suspect announced in *Garner* does not apply with "obvious clarity" to Deputy Cox's conduct in this case. Instead, the court states that "the Garner rule does not always provide 'a clear answer as to whether a particular application of deadly force will be deemed unjustified by the Courts.'" (Citations omitted) *Vaughan*, 316 F.3d 1210, App. 5. The Eleventh Circuit states that nothing in the prior decisional law could be read to give fair warning to Defendant Cox that attempting to summarily execute an unarmed fleeing, non-violent felony suspect simply because he was speeding at ten to fifteen miles per hour over the speed limit would violate that suspect's Fourth Amendment rights. The Eleventh Circuit has refused to attribute any common sense to law enforcement officers within its jurisdiction.

The very essence of *Garner* was to set out *specific* guidelines for use of deadly force on fleeing suspects. Those guidelines are clearly reflected in local, state and

nationally recognized standards of police procedure. To say that those specific guidelines are too vague to provide any fair notice in this situation is absurd. Given the breadth and, importance of *Garner*, and the sheer number of times that case has been cited, this issue is crucial to the qualified immunity analysis and needs to be resolved by this Court.

### C. The Eleventh Circuit decision below is inconsistent with other federal appellate court decisions in this area of the law.

The Seventh Circuit, in both *Estate of Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993) and *United States v. Bradley*, 196 F.3d 762 (7th Cir. 1999) has held that where a suspect is fleeing in a motor vehicle, even if that motor vehicle may have been coming toward the law enforcement officer, these facts alone do not establish sufficient grounds for a reasonable police officer to believe that it would be lawful to use deadly force to stop the suspect.

The Eighth Circuit, in *McCaslin v. Wilkins*, 183 F.3d 775 (8th Cir. 1999), held that if there is a fact question as to whether or not a warning was feasible before use of deadly force, or if there is a question of fact whether or not the suspect posed a threat of serious physical harm or death to the officer or others at the time of the shooting, that summary judgment on qualified immunity grounds would be improper. This ruling directly contradicts the Eleventh Circuit ruling in *Vaughan*, where substantial material factual issues remain, and the court held that a reasonable jury could find both that the officer was unreasonable in his firing on the suspect and that a warning before use of deadly force was feasible. The only uncontroverted facts, that the suspect vehicle was fleeing to elude

at ten to fifteen miles per hour over the speed limit, were not sufficient to provide a reasonable belief that shooting to kill the suspects was permissible.

Also in the Eighth Circuit, in *Wilson v. City of Des Moines Iowa*, 297 F.3d 447, 2002 U.S. App. LEXIS 11087 (June 7, 2002, 8th Cir.). That circuit held that if there is an issue of fact as to the reasonableness as to what the officer did, then summary judgment is not proper. "The current record does not conclusively establish the reasonableness of the officer's actions or beliefs." Contrast that opinion with the Eleventh Circuit's position in *Vaughan*, and it would appear that whether or not a vehicle speeding to elude at a few miles above the speed limit, should, at the very least, create a jury issue as to whether or not shooting and paralyzing Jerry Vaughan under these facts was based on a reasonable belief that it was justified.

In *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), determining qualified immunity under the standard set forth by the Supreme Court in *Saucier v. Katz*, 533 U.S. 194, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001), the Ninth Circuit looked first to whether the State's interest in stopping the suspect by use of deadly force outweighed the interest of the suspect in his life and to be free from use of excessive force. "A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury." *Deorle* at 1281. Despite the fact that they could find no prior case with substantially similar facts involving shooting suspects with "bean bags," the court found that the law was clearly established that shooting in those circumstances, without first giving a warning, would be unlawful. In applying the "where feasible" warning requirement of *Garner*, the Ninth

Circuit held that the desirability and feasibility of giving a warning in that case was obvious.

In *Rosales v. City of Phoenix*, 25 Fed. App. 542, 2001 U.S. App. LEXIS 27599 (9th Cir. 2001), the Ninth Circuit held that because the officers' own statements did not show justification for use of deadly force, the officers were not entitled to qualified immunity. The officers offered no specific evidence that the plaintiff posed a significant or specified threat of death or serious bodily injury to the officers or others.

In *Bray v. County of San Diego*, 1994 U.S. App. LEXIS 4289 (9th Cir. 1994), the court held that officers who fired shots at a suspected stolen vehicle that was backing toward the officers were not entitled to qualified immunity simply because the moving vehicle created a danger. In *Vaughan*, Officer Cox, during his deposition, stated that the reason he fired at the plaintiff's vehicle was because the vehicle swerved at him when he was parallel to them and he had his gun aimed at the car. This evidence is highly disputed by both the driver and the Plaintiff, where they contend that they did not swerve at all except after Cox began firing shots, when they started ducking to avoid being hit by the officers' fire. (R2-28, Rayson aff. p. 2; R1-17, Vaughan depo. pp. 81-84). Under the Ninth Circuit reasoning cited above, that court would clearly hold that because a genuine issue of material fact existed as to the justification for the use of deadly force without first giving a warning, summary judgment would not be proper in *Vaughan*.

Similarly, in *Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998). The Ninth Circuit held that although a suspect had been shooting at

officers and was on his way back to his cabin toward his gun, it was unreasonable for the officers to shoot the suspect without first giving a warning of the impending use of deadly force. (*See also, Perrin v. Gentner* 2001 U.S. Dist. LEXIS 21221 (December 13, 2001), where that court stated the applicable standard to be that *unless infeasible*, an officer must issue a warning before using deadly force.)

It is also noteworthy that the dissenting opinion in *Vaughan* was authored by Circuit Judge Noonan, sitting by designation from the Ninth Circuit.

> If a reasonable jury found the facts the court says it could find, Cox with time to warn Vaughan discharged his weapon three times into a small area containing two human beings. I do not see how Cox's conduct, if so found, differed in any material respect from the conduct found to be unconstitutional in *Tennessee v. Garner,* 471 U.S. 1 (1985). Surely it is not for this court to preempt the jury and resolve all material facts in dispute against *Vaughan. See, Saucier v. Katz*, 121 S. Ct. 2151, 2156; *Behrens v. Pelletier*, 516 U.S. 299, 309, (1996). If, as the court has stated, these facts could be resolved in Vaughan's favor, then Cox was on notice that to shoot a fleeing felon without notice is a seizure and violation of the Fourth Amendment. As the dissent in our first consideration of this case suggested, it is difficult to discern why, if police officers in Tennessee and Minnesota and Connecticut were on notice that the use of lethal force to restrain a suspect is unreasonable, Georgia police officers should be supposed slow to have learned. *See, Vaughan*, at 264 F.3d 1027 (dissent). Not only case law gave notice. Just as "the obvious cruelty" inherent in their actions gave "some notice" to the Alabama

> prison officials in *Hope*, so the obvious danger inherent in shooting into the occupied front seat of a car gave Cox "some notice" of the unconstitutional character of his alleged action.

*Vaughan*, 316 F.3d 1210, App. 9-10

Contrary to the holding in this case, other circuits clearly hold that whether the force used was excessive must be objectively determined and is a jury question. *Barlow v. Ground*, 943 F.2d 1132 (9th Cir. 1991) *cert. denied*, 120 L. Ed. 2d 872, 112 S. Ct. 2995 (1992); *Posr v. Doherty* 944 F.2d 91 (2nd Cir. 1991); *Dixon v. Richer*, 922 F.2d 1456 (10th Cir. 1991). Further, this Court has held that "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). The Eleventh Circuit has stripped the Plaintiff of his right to have the jury perform these functions.

It should also be noted that the Eleventh Circuit, contrary to the other Circuits, refuses to look outside its own Circuit for "clearly established law" purposes, and refuses to look to the "consensus of persuasive authority." *See, Wilson v. Layne*, 526 U.S. 603, 617 (1999). Again, this approach is consistent with the Eleventh Circuit's overall slant toward summarily disposing of as many of its § 1983 cases as possible. This is an offensive injustice to civil rights law.

Guidance by this Court is necessary to provide uniformity across the courts of the United States in dealing with the issues of what law is "clearly established" and whether or not the law in *Garner* is sufficiently

explicit to qualify as "established law" for qualified immunity and summary judgment purposes.

**D. The Writ should be granted in this case because it involves an issue of great importance of whether in ruling on qualified immunity a Court can completely ignore the existence of local, state and nationally recognized standards of police procedure in ruling, as a matter of law, that an officer did not have "fair notice" that his actions violated constitutional rights, and clarification is needed to further define "fair notice" pursuant to *Hope* and *Lanier*.**

Since *Tennessee v. Garner* set forth specific guidelines for use of deadly force upon fleeing suspects, it appears that those criteria would apply with "obvious clarity" to the facts of this case. In deciding whether a Defendant had fair notice that his actions in shooting an unarmed fleeing suspect were unconstitutional, the court should consider local, state and nationally recognized standards and policies of police procedure of which an objectively reasonable officer should have known, and which embody preexisting caselaw. The Eleventh Circuit completely ignored these standards of police procedure in ruling that *Garner, Graham v. Conner*, 490 U.S. 386 (1989) and *Acoff v. Abston*, 762 F.2d 1543 (11th Cir. 1985), were insufficient to provide notice to Cox that his actions were unconstitutional.

As set forth in the Statement of the Case above, at the time of the shooting, there were standards in the *Georgia Peace Officer's Standards and Training Council Handbook*, local "written" Coweta County Department policy, and standards for police procedures found in the Training

Keys for the International Association of Chiefs of Police, all of which embody the fundamental principles involved in *Graham v. Conner*, and *Tennessee v. Garner*. A reasonable officer in Defendant Cox's position should have been familiar with all of these standards. While these standards admittedly do not create more or higher constitutional standards, certainly they should be relevant on the issue of whether or not the officer was given "fair notice" of the state of the law in regard to particular factual circumstances.

In this case, the fact that Cox violated his own Coweta County department written policy, *Georgia Peace Officer's Standards and Training (P.O.S.T.) Council Handbook* policy, and International Association of Chiefs of Police policy in these circumstances, when taken in light of the general principles and specific criteria set forth in *Garner* and *Graham*, certainly should have given this officer "fair warning" or "fair notice" that the law was sufficiently established that his actions violated the suspect's constitutional rights. Indeed, in addition to Plaintiff's very qualified experts, even Defendants' own expert, a Georgia P.O.S.T. instructor, states that if you take the Plaintiff's version of the facts as true, Cox would not have been justified in shooting.

The Eleventh Circuit completely ignored, in both opinions in this case, any and all reference to such standards or policies. In *Hope v. Pelzer*, the Court noted that "relevant to the question whether *Ort* provided fair warning to respondents that their conduct violated the Constitution is a regulation promulgated by [Alabama Dept. of Corrections] in 1993." *Hope* at 25. In *Garner*, in evaluating the reasonableness of police procedure under the Fourth

Amendment, the Court analyzed policies of police procedure adopted by various departments around the country. The Court concluded that it would be important to analyze the police policies for guidance in ruling on the reasonableness of particular police practice. *Garner* at 18, 19. Likewise, it should be impermissible for a Court to rule that particular case law does not apply to a particular situation because of a lack of factual similarity, without some reference to whether long-standing departmental, state, or national standards (which no doubt have derived from case law) apply to a particular factual circumstance. Had these policies been followed, this case would not exist. Certainly it would be reasonable to assume the officer was perhaps more familiar with those standards than with the case law they are based upon. This issue is of great federal importance in further defining the law regarding qualified immunity and warrants consideration by this Court.

## CONCLUSION

The Writ in this case should be granted because it provides a great opportunity for this Court to further clarify the somewhat complicated law of qualified immunity. This Court has provided guidance to the Eleventh Circuit Court of Appeals, which it has ignored.

The Eleventh Circuit, in both *Vaughan* cases refuses to acknowledge the holding in *Hope* that "fair notice" to a defendant may be provided by general constitutional rules in obvious situations. They continue to require "something clearer than 'clearly established'" and "something beyond 'fair notice'" *Hope*, 536 U.S. 730, 122 S. Ct. 2508, 2515, *quoting Lanier*, 520 U.S. 259 at 270-271.

Guidance from this Court is absolutely necessary to clarify whether the "where feasible" language of *Garner* can apply to cases other than those factually similar to *Garner*. This Court's guidance is also needed to state whether or not relevant, local, state, and national standards of police procedure should be consulted by the Court in determining whether or not a state actor had "fair notice" that his actions were unconstitutional.

For these reasons, the Petition for Writ of Certiorari in this case SHOULD BE GRANTED.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 00-14380

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D.C. Docket No. 99-00006-CV-JTC-3

JERRY CHARGES VAUGHAN,

Plaintiff-Appellant,

versus

FRED LAWRENCE COX, OFFICER,
individually and in his official capacity
as an officer of the Coweta County Sheriff's
Department, COWETA COUNTY, GEORGIA, et al.,

Defendants-Appellees.

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Appeal from the United States District Court
for the Northern District of Georgia

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**(Filed January 3, 2003)**

**ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES**

Before CARNES, COX and NOONAN*, Circuit Judges.

COX, Circuit Judge:

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* Honorable John T. Noonan, Jr., United States Circuit Judge for the Ninth Circuit, sitting by designation.

The issue presented by this case is whether Deputy Fred Lawrence Cox is entitled to qualified immunity and, consequently, is shielded from Jerry Charles Vaughan's suit seeking damages under 42 U.S.C. § 1983 for alleged violations of his Fourth Amendment rights arising out of a police chase. This case is before us on remand from the Supreme Court. In our earlier opinion, *Vaughan v. Cox,* 264 F.3d 1027 (11th Cir. 2001), we concluded that a reasonable jury could find that Deputy Cox's use of deadly force was unconstitutional, but we affirmed the district court's grant of summary judgment to Deputy Cox in his individual capacity because he was protected by qualified immunity. *Id.* at 1035, 1037. The Supreme Court vacated our judgment and remanded the case for reconsideration in light of its recent decision in *Hope v. Pelzer,* 536 U.S. ___, 122 S. Ct. 2508 (2002). We asked the parties to file supplemental briefs addressing the effect of *Hope* on the outcome of this case. Having reconsidered this case in light of *Hope,* we hold that Deputy Cox is entitled to qualified immunity.

The facts of this case are presented in our original opinion, and we need not repeat the story. *See Vaughan,* 264 F.3d at 1030-32. Vaughan filed suit for damages under 42 U.S.C. § 1983 alleging that Deputy Cox violated his Fourth Amendment rights by employing deadly force (firing a shot that paralyzed Vaughan) in violation of the constitutional requirements of *Tennessee v. Garner,* 471 U.S. 1, 105 S. Ct. 1694 (1985). Because Vaughan has alleged a constitutional violation and Deputy Cox has asserted a qualified immunity defense, we must conduct a

two-part inquiry.[1] *Saucier v. Katz,* 533 U.S. 194, 200, 121 S. Ct. 2151, 2155 (2001). First, we must ask if the facts, taken in the light most favorable to Vaughan, show that Deputy Cox's conduct violated Vaughan's Fourth Amendment rights. *Id.* at 201, 121 S. Ct. at 2156. Second, if we conclude that Vaughan's constitutional rights have been violated under the facts alleged, we must determine whether Vaughan's right was clearly established – that is, whether it would have been clear to a reasonable officer that Deputy Cox's conduct was unlawful. *Id.* at 202, 121 S. Ct. at 2156.

In our original opinion, we addressed Vaughan's purported constitutional violation and held that a reasonable jury could conclude – if the facts alleged by Vaughan were proven – that a constitutional violation occurred. *Vaughan,* 264 F.3d at 1034-35. The Supreme Court's decision in *Hope* does not modify our analysis of the underlying Fourth Amendment violation.

Having concluded that the facts alleged could support a constitutional violation, we now revisit the qualified immunity question: whether it would be clear to a reasonable officer that Deputy Cox's conduct was unlawful. It is well-settled that a constitutional right is clearly established only if its contours are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S. Ct. 3034, 3039 (1987). In determining whether

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[1] We review de novo a district court's grant of summary judgment, drawing all inferences in favor of the nonmoving party, Vaughan. *Korman v. HBC Fla., Inc.,* 182 F.3d 1291, 1293 (11th Cir. 1999).

the contours of a constitutional right are clearly established, we examine cases that announce general constitutional rules or apply those rules to factual circumstances to determine if a reasonable public official, who is charged with knowledge of such opinions, would have understood the constitutional implications of his conduct. With regard to this inquiry, the Supreme Court in *Hope* cautioned that we should not be unduly rigid in requiring factual similarity between prior cases and the case under consideration. The "salient question," the Court said, is whether the state of the law gave the defendants "fair warning" that their alleged conduct was unconstitutional. *Hope,* 536 U.S. at ___, 122 S. Ct. at 2516. We reconsider the qualified immunity issue in light of *Hope.*[2]

On remand, Vaughan relies exclusively on the rule announced in *Tennessee v. Garner.* His reliance is misplaced. In *Garner,* the Supreme Court held that deadly force is permissible if (1) the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, (2) the use of deadly force is necessary to prevent escape, and (3) some warning has been given, if feasible. 471 U.S. at 11-12, 105

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[2] Even if the caselaw fails to make sufficiently clear to a reasonable public official the constitutional infirmity of his conduct, the official may not be entitled to qualified immunity if his conduct "lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of caselaw." *Smith v. Mattox,* 127 F.3d 1416, 1419 (11th Cir. 1997). This exception is narrow. *See Lee v. Ferraro,* 284 F.3d 1188, 1199 (11th Cir. 2002). The Supreme Court's opinion in *Hope* neither eviscerated nor modified this court's decision in *Smith,* and on remand, Vaughan does not contend that Deputy Cox's conduct falls within *Smith*'s narrow scope.

S. Ct. at 1701; *Acoff v. Abston,* 762 F.2d 1543, 1547 (11th Cir. 1985). Although a general constitutional rule "may apply with obvious clarity to the specific conduct in question" in limited circumstances, we conclude that the rule announced in *Garner* does not apply with "obvious clarity" to Deputy Cox's conduct in this case. *United States v. Lanier,* 520 U.S. 259, 271, 117 S. Ct. 1219, 1227 (1997). The *Garner* rule does not always provide "a clear answer as to whether a particular application" of deadly force will be deemed unjustified by the courts. *Cf. Saucier,* 533 U.S. at 205, 121 S. Ct. at 2158 (concluding that the general constitutional rule in *Graham v. Connor,* 490 U.S. 386, 109 S. Ct. 1865 (1989), regarding the proper application of non-deadly force did not apply with obvious clarity to clearly establish that an officer's conduct was unlawful in the situation he confronted). Whether Deputy Cox had arguable probable cause, whether deadly force was necessary to prevent Vaughan's escape, and whether a warning was feasible in the instant case are all questions that the general *Garner* rule does not clearly answer. Because the *Garner* rule, standing alone, does not apply with "obvious clarity" such that Deputy Cox was given fair warning that his alleged conduct was unconstitutional, we must consider whether, in light of *Hope,* the cases applying the *Garner* rule provided fair warning to Deputy Cox that his conduct violated Vaughan's constitutional rights.

We conclude that prior decisions did not provide fair warning to Deputy Cox that his alleged conduct violated Vaughan's Fourth Amendment rights. Although the *Hope* decision can be read to invite Vaughan to offer analogous, though not necessarily factually identical, Fourth Amendment cases to show that the law was clearly established at the time of the shooting, Vaughan has failed to do

so. Vaughan concedes that similar cases do not exist, (Vaughan Supp. Reply Br. at 5), and he cites only three cases – *Garner, Graham,* and *Acoff* – for the proposition that the law provided fair warning to Deputy Cox as of January 1998 that his conduct was unconstitutional. *Garner* and *Graham,* as noted above, establish general constitutional rules that do not apply with "obvious clarity" to the incident at issue in this case. *Acoff* was brought to our attention when this case was originally before us. *See Vaughan,* 264 F.3d at 1034. We conclude that *Acoff,* which involved a quite different factual circumstance and invalidated a general police policy that contravened the principles established in *Garner,* failed to provide fair warning to Deputy Cox that his application of deadly force violated the Fourth Amendment. *Acoff,* 762 F.2d at 1547-48.

The dissent concludes that summary judgment is improper because a reasonable jury, under Vaughan's version of the events, could find that Deputy Cox's conduct violated the Fourth Amendment. The dissent reasons that if the jury were to reach such a conclusion, Deputy Cox necessarily would have been on notice at the time of the shooting that his conduct was unconstitutional. This approach fails to acknowledge that law enforcement officers like Deputy Cox may reasonably but mistakenly conclude that probable cause exists to justify the use of deadly force. For qualified immunity purposes, therefore, we ask whether officers had "arguable probable cause" – that is, whether the officer reasonably could have believed that probable cause existed. *Montoute v. Carr,* 114 F.3d 181, 184 (11th Cir. 1997). In contrast, the dissent's approach would deny qualified immunity in any case in which the jury *could* conclude that the officer actually

lacked probable cause, effectively reading "arguable" out of the "arguable probable cause" standard. *See, e.g., Knight v. Jacobson,* 300 F.3d 1272, 1274 (11th Cir. 2002); *St. George v. Pinellas County,* 285 F.3d 1334, 1337 (11th Cir. 2002). We decline to adopt such an approach. In our prior opinion, we concluded that Deputy Cox had arguable probable cause, *see Vaughan,* 264 F.3d at 1036, and we reaffirm that decision today.

We reinstate our prior decision in its entirety and supplement, by this opinion, our previous discussion of qualified immunity.

SO ORDERED.

NOONAN, Circuit Judge, dissenting:

The petition for a writ of certiorari in this case was granted, and the judgment of this court was vacated. *Vaughan v. Cox,* 122 S. Ct. 2653 (June 28, 2002). The case was remanded to us "for further consideration in light of *Hope v. Pelzer,* 536 U.S. ___, 122 S. Ct. 2508 (2002)." *Hope v. Pelzer* had reversed another decision by the Eleventh Circuit Court of Appeals, 240 F.3d 975 (11th Cir. 2001). That case had held that prison officials in Alabama would not be on notice that tying a prisoner to a hitching post for seven hours, his back bare to the sun, his wrists tortured by handcuffs that swelled with the heat, while he was denied any release to urinate or defecate and was denied any water by a guard who gave water from a pitcher to a dog but spilled it on the ground before the prisoner, was cruel and unusual punishment. The Eleventh Circuit in *Hope* found the conduct of the prison officials unconstitutional but held that there were no cases with "materially similar facts" that would have put the officials on notice that their conduct was cruel and unusual. *Id.* at 981.

Reversing the circuit court decision, the Supreme Court noted that the "focus in the case was the Eleventh Circuit's position that a violation is not clearly established unless it is the subject of a prior case of liability on facts 'materially similar' to those charged." The Supreme Court noted that the circuit court's decision "exposes the danger of a rigid overreliance on factual similarity." *Hope,* 122 S. Ct. at 2517. The Court went on to cite analogous binding Fifth Circuit precedents and to add: "The obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment." *Id.* at 2511.

Invited to give "further consideration" to Vaughan's case in the light of *Hope,* the majority comes to the same conclusion it reached before. The majority states: "Whether Deputy Cox had arguable probable cause, whether deadly force was necessary to prevent Vaughan's escape, and whether a warning was feasible in the instant case are all questions that the general *Garner* rule does not clearly answer." Op. at p. 5.

In the prior opinion the court held that "a reasonable jury could find that Deputy Cox acted unreasonably in firing at the pickup." First, material issues of fact remain as to whether Vaughan and Rayson's continued escape presented an immediate threat of serious harm to Cox or others. Assuming Vaughan's version of events, it is not clear that Looney or Cox were in immediate danger from the suspects at the time of the shooting, nor does the record reflect that the suspects had or were likely to menace other innocent drivers. What Deputy Cox was faced with at the time he fired his weapon was simply two suspects who were evading arrest and had accelerated to

eighty or eighty-five miles per hour in an attempt to avoid capture. Under such facts, a reasonable jury could find that Vaughan and Rayson's escape did not present an immediate threat of serious harm to Cox or others on the road.

"Second, a reasonable jury could find that it was feasible for Cox to warn the truck's occupants of the potential application of deadly force. According to Vaughan's version of events, Cox pulled his cruiser parallel to the truck, turned his rooftop lights on and waited for thirty to forty-five seconds before firing his weapon. A reasonable jury could therefore conclude that Cox had the time and opportunity to warn Vaughan and Rayson that he was planning to use deadly force before he opened fire." *Vaughan v. Cox,* 264 F.3d at 1034-35.

If a reasonable jury found the facts the court says it could find, Cox with time to warn Vaughan discharged his weapon three times into a small area containing two human beings. I do not see how Cox's conduct, if so found, differed in any material respect from the conduct found to be unconstitutional in *Tennessee v. Garner,* 471 U.S. 1 (1985). Surely it is not for this court to preempt the jury and resolve all material facts in dispute against Vaughan. *See Saucier v. Katz,* 121 S. Ct. 2151, 2156; *Behrens v. Pelletier,* 516 U.S. 299, 309 (1996). If, as the court has stated, these facts could be resolved in Vaughan's favor, then Cox was on notice that to shoot a fleeing felon without notice is a seizure in violation of the Fourth Amendment. As the dissent in our first consideration of this case suggested, it is difficult to discern why, if police officers in Tennessee and Minnesota and Connecticut were on notice that the use of lethal force to restrain a suspect is unreasonable, Georgia police officers should be supposed slow to

have learned. *See Vaughan,* at 264 F.3d 1027 (dissent). Not only case law gave notice. Just as "the obvious cruelty" inherent in their actions gave "some notice" to the Alabama prison officials in *Hope,* so the obvious danger inherent in shooting into the occupied front seat of a car gave Cox "some notice" of the unconstitutional character of his alleged action.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 00-14380

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D. C. Docket No. 99-00006-CV-JTC-3

JERRY CHARLES VAUGHAN,

Plaintiff-Appellant,

versus

FRED LAWRENCE COX, OFFICER,
individually and in his official capacity
as an officer of the Coweta County Sheriff's
Department, Coweta County, GEORGIA, et al.,

Defendants-Appellees.

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Appeal from the United States District Court
for the Northern District of Georgia

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(August 31, 2001)

Before CARNES, COX and NOONAN*, Circuit Judges.

COX, Circuit Judge:

Jerry Charles Vaughan appeals the district court's order granting summary judgment in favor of Deputy Fred Lawrence Cox, Coweta County, Georgia, and Coweta

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* Honorable John T. Noonan, Jr., U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

County Sheriff Mike Yeager on Vaughan's 42 U.S.C. § 1983 claims related to injuries he suffered during a police chase. We affirm in part and vacate and remand in part.

*Background*[1]

In the early morning of January 5, 1998, the Sheriff's Department of Coweta County, Georgia received a report that a red pickup truck with a silver tool box in its bed had been stolen from a service station along I-85 south of Atlanta. The report included the information that the suspect, a white male wearing a white t-shirt, was believed to be heading north on I-85. In response to the report, Deputy Cox and Deputy Jeff Looney headed to the northbound lanes of I-85 in separate vehicles. Deputy Looney pulled onto the grass median to observe passing traffic. Deputy Cox continued farther north and stopped at the sight of a recent accident. Deputy Looney soon spotted a truck traveling northward that matched the description of the stolen vehicle but, contrary to the report, was towing a trailer loaded with two personal watercraft. Looney reported his sighting on his radio and began to follow the truck. After hearing Looney's report of his observation, Deputy Cox radioed Looney to inform him that there was an accident scene north of his position and that he should not attempt to stop the vehicle until it had passed by the accident.

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[1] There are several important disputes between the parties as to what transpired in the period prior to the shooting. As is our obligation at the summary judgment stage, we will resolve all disputes in favor of Vaughan's version of events.

As the red pickup and Deputy Looney passed him, Deputy Cox pulled out and joined the pursuit. While tracking the truck, the deputies made efforts to determine whether the vehicle was indeed the stolen truck. To this end, Deputy Cox sped up and passed the truck, which was proceeding at or near the speed limit. He observed two men in the cab. The man in the passenger's seat, Mr. Vaughan, matched the description of the suspect. Cox's suspicions confirmed, he and Deputy Looney decided to use a "rolling roadblock" to stop the vehicle, which involves officers blocking a suspect vehicle with their police cars and reducing speed, in the hope that the suspect car will slow down as well. Deputy Looney positioned his cruiser directly behind the pickup. Deputy Cox moved in front of the truck. Vaughan has conceded that by this point the deputies had made it clear that they desired to stop the pickup. As soon as he had positioned his vehicle in front of the truck, Deputy Cox applied his brakes. The truck rammed into the back of Cox's cruiser. Deputy Cox has testified that the impact caused him to momentarily lose control; Vaughan and the pickup's driver, Freddy Rayson, however, contend that the impact was both accidental and insufficient to cause Cox to lose control.

Rayson did not pull over following the collision, but instead accelerated while staying in the same lane of traffic.[2] Deputy Cox decided to reposition his vehicle behind the truck. He unholstered his sidearm and rolled

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[2] On cross-examination, Vaughan conceded that Rayson began to drive "recklessly" after the collision with Cox's vehicle. However, Vaughan maintains that while Rayson did accelerate, he did not change lanes or weave in and out of traffic.

down the passenger side window. Cox testified that he readied himself in this manner in case Rayson made aggressive moves in his direction. Cox then shifted his cruiser one lane to the left and slowed to allow the truck to pass by him. As soon as his cruiser was even with the pickup, Deputy Cox turned on his rooftop lights. Rayson responded by accelerating to eighty or eighty-five miles per hour. Cox then fired three rounds into the truck. It is undisputed that Deputy Cox did not warn the truck's occupants before he used his weapon. Cox testified that he fired because the pickup swerved as if to smash into his cruiser. Vaughan maintains that the truck, while increasing its speed, made no motion in the direction of Cox's vehicle and the shooting was unprovoked.

Deputy Cox's plan was to disable either the truck or Rayson so that he could force the truck off the road. However, his volley disabled neither the truck nor Rayson. The third bullet fired from Cox's weapon instead punctured Vaughan's spine, paralyzing him instantly below the chest. Rayson's only reaction to the shooting was to drive faster and more recklessly.[3] As the chase continued into more heavily congested sections of the highway, Cox made several more attempts to stop the vehicle, firing his weapon once more. After an extended chase, the pickup struck the cement median and came to a stop. Vaughan was removed from the truck and taken to a hospital.

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[3] After the shooting, Rayson began a desperate break for freedom which involved weaving in and out of lanes, driving at highway speeds through exit ramps, and dragging at least one of the watercraft, which had fallen off the trailer, along the ground.

Vaughan filed suit for damages pursuant to 42 U.S.C. § 1983 in the Northern District of Georgia against Deputy Cox in his individual and official capacities, Coweta County, and Coweta County Sheriff Mike Yeager in his official capacity. Vaughan's complaint alleges that: (1) Deputy Cox violated one or more of the Fourth, Fifth, Eighth, and Fourteenth Amendments in using excessive force in his attempt to stop the pickup; (2) Sheriff Yeager promulgated and established policies that caused Deputy Cox to violate Vaughan's rights; and (3) Cox's actions also constituted "negligence, assault and battery, false arrest, intentional infliction of emotional distress[,] and outrageous conduct" under Georgia law. (R.1-1 at 6.) The defendants moved for summary judgment. In analyzing Vaughan's federal claims, the court first determined that since Vaughan alleged that Cox used excessive force, a Fourth Amendment analysis should be applied. The district court thereafter found that: (1) Vaughan was not "seized" within the meaning of the Fourth Amendment by Cox's bullet; and (2) even if Vaughan had been seized by the bullet that hit him in the spine, the use of force was reasonable given the circumstances. Because it found that no constitutional violation had occurred, the court granted the defendants summary judgment and declined to exercise supplemental jurisdiction over the state law claims.[4] Vaughan appeals.

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[4] Vaughan has raised no arguments on appeal regarding the district court's decision not to exercise jurisdiction over his state law claims.

*Issues on Appeal*

Vaughan argues on appeal that: (1) the district court erred in finding that he was not seized when shot by Deputy Cox; (2) issues of fact remain as to whether Cox's actions were objectively reasonable; and (3) even assuming that no seizure occurred, he still has a valid Fourteenth Amendment substantive due process claim based on Cox's deliberately indifferent and conscience-shocking conduct. We review a district court's grant of summary judgment de novo, drawing all indifferences in favor of the nonmoving party. *See Korman v. HBC Fla., Inc.*, 182 F.3d 1291, 1293 (11th Cir. 1999). We will address each of the issues raised by Vaughan in turn.

*Discussion*

The first step in reviewing an excessive force claim is to determine whether the plaintiff was subject to the "intentional acquisition of physical control" by a government actor. *Brower v. County of Inyo*, 489 U.S. 593, 596, 109 S. Ct. 1378, 1381 (1989). It is clear that "apprehension by the use of deadly force is a seizure. . . . " *Tennessee v. Garner*, 471 U.S. 1, 7, 105 S. Ct. 1694, 1699 (1985). It is also apparent that Vaughan could have been "seized" for Fourth Amendment purposes even though he was not taken into custody immediately following the shooting. As the Supreme Court has noted, "the application of physical force to restrain movement, even when it is ultimately unsuccessful" is sufficient to constitute a seizure. *California v. Hodari D*, 499 U.S. 621, 626, 111 S. Ct. 1547, 1550 (1991). Undeniably, Cox's firing of his weapon was an application of force with the design to restrain movement. It is therefore irrelevant that Vaughan was not actually taken into custody until after the lengthy chase. However,

the Supreme Court has held that a seizure occurs "only when there is a governmental termination of freedom of movement *through means intentionally applied.*" *Brower*, 489 U.S. at 597, 109 S. Ct. at 1381 (emphasis in original). The question remains whether Cox's action in firing his weapon at the truck can be deemed "means intentionally applied" to seize Vaughan.

The district court concluded, and Deputy Cox contends here, that Vaughan was not seized by the bullet because Cox did not intend to hit Vaughan when he fired his pistol. Instead, Cox planned to seize both Rayson and Vaughan by disabling the truck or Rayson with a volley of bullets and then ramming the pickup off the road. Cox argues that Vaughan was not seized because Cox, while intending to apprehend Vaughan, did not intend to stop him by shooting him.[5] In Deputy Cox's view, a seizure can only occur when an officer stops a suspect using the specific means that he intended. Because Cox did not intend to shoot Vaughan, he contends that Vaughan did not suffer a Fourth Amendment seizure. We disagree.

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[5] In support of this position, Deputy Cox cites several cases from our sister circuits where courts rejected Fourth Amendment claims brought by innocent bystanders or hostages accidentally harmed by police fire. *See Rucker v. Harford County*, 946 F.2d 278 (4th Cir. 1991) (bystander not seized by police bullet aimed at fleeing vehicle); *Childress v. City of Arapaho*, 210 F.3d 1154 (10th Cir. 2000) (hostage wounded by police bullet aimed at suspect not seized); *Medeiros v. O'Connell*, 150 F.3d 164 (2nd Cir. 1998) (same); *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791 (1st Cir. 1990) (same). These cases are of little aid to our inquiry, however, because Vaughan was neither an innocent bystander nor a hostage; instead, he was a suspect whom Deputy Cox sought to apprehend.

The Supreme Court has cautioned against a too finely drawn reading of "means intentionally applied." *Brower*, 489 U.S. at 598, 109 S. Ct. at 1382. It is not necessary for the means by which a suspect is seized to conform exactly to the means intended by the officer. Otherwise courts could be compelled to conclude that "one is not seized who has been stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg." *Id.* at 598-99, 109 S. Ct. at 1382. Instead, the Court has held that it is enough "that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result." *Id.* That standard has been met in this case. Cox fired his weapon to stop Vaughan and Rayson; Vaughan was struck by one of those bullets. Because Vaughan was hit by a bullet that was meant to stop him, he was subject to a Fourth Amendment seizure. We therefore must turn to the question of whether the seizure could be found "unreasonable."

A police officer may use deadly force to seize a fleeing felony[6] suspect when the officer: (1) "has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others" or "that he has committed a crime involving the infliction or threatened infliction of serious physical harm;" (2) reasonably believes that the use of deadly force was necessary to prevent escape; *and* (3) has given some warning about the possible use of deadly force, if feasible. *Garner*, 471 U.S. at 11-12, 105 S. Ct. at 1701; *Acoff v. Abston*, 762 F.2d 1543, 1547

[6] There is no dispute that Vaughan was a suspect in at least one felony.

(11th Cir. 1985). We review an officer's use of force "from the perspective of a reasonable officer on the scene," taking care to make allowances "for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 396-97, 109 S. Ct. 1865, 1872 (1989). It is undisputed that Deputy Cox had no reason to believe that Vaughan or Rayson had committed a crime involving the infliction or threatened infliction of physical harm. Therefore, our inquiry is limited to whether a reasonable officer: (1) would have had probable cause to believe that the Vaughan and Rayson's unabated flight posed an immediate threat of serious harm to Deputy Cox, other police officers, or innocent motorists; (2) would have believed that deadly force was necessary to stop the suspects; and (3) would have concluded that it was not feasible to warn the suspects of the possible use of deadly force. *See Acoff*, 762 F.2d at 1547.

Resolving all evidentiary disputes in Vaughan's favor, we conclude that a reasonable jury could find that Deputy Cox acted unreasonably in firing at the pickup. First, material issues of fact remain as to whether Vaughan and Rayson's continued escape presented an immediate threat of serious harm to Cox or others. Assuming Vaughan's version of events, it is not clear that Looney or Cox were in immediate danger from the suspects at the time of the shooting, nor does the record reflect that the suspects had

or were likely to menace other innocent drivers.[7] What Deputy Cox was faced with at the time he fired his weapon was simply two suspects who were evading arrest and had accelerated to eighty or eighty-five miles per hour in an attempt to avoid capture. Under such facts, a reasonable jury could find that Vaughan and Rayson's escape did not present an immediate threat of serious harm to Cox or others on the road.[8]

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[7] According to Vaughan, the pick-up's lane was clear of traffic and Rayson made no moves to change lanes before Cox fired.

[8] In support of his position, Cox cites three cases from our sister circuits in which courts found the application of deadly force in a high-speed chase to be reasonable as a matter of law. However, the facts of the cited cases diverge significantly from the case at bar. In *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992), a suspect led an officer on a "wild chase at speeds in excess of ninety miles per hour," attempted to ram the officer's car twice, and drove around a police blockade at high speed in an effort to avoid arrest. 954 F.2d at 344. The officer eventually cornered the suspect in a dead-end street, blocking the suspect's vehicle with his police car. *See id.* After the officer exited his vehicle to make an arrest, the suspect smashed his car into the officer's cruiser and made yet another a break for freedom. *See id.* It was only at this point that the officer used deadly force to prevent the suspect's escape. *See id.* The Sixth Circuit concluded that the officer's use of deadly force was justified given that the suspect had demonstrated that he posed a major threat to other officers and the public. *Id.* at 347.

In *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993), a suspect driving an eighteen-wheel tractor trailer led the police on a lengthy highway chase at speeds exceeding ninety miles per hour. 993 F.2d at 1330. The suspect thwarted multiple efforts to establish a rolling roadblock, ran through a stationary roadblock, refused to stop after the police had shot out two of the truck's tires, and forced more than one hundred innocent motorists off the road. *See id.* at 1330-31. During the chase, the pursuing officers were continuously compelled to take measures in order to stop the suspect from hitting both police and civilian vehicles on a crowded highway. *See id.* at 1331. After multiple attempts to stop the truck using other means had failed, one of the pursuing officers shot

(Continued on following page)

Second, a reasonable jury could find that it was feasible for Cox to warn the truck's occupants of the potential application of deadly force. According to Vaughan's version of events, Cox pulled his cruiser parallel to the truck, turned his rooftop lights on and waited for thirty to forty-five seconds before firing his weapon. A reasonable jury could therefore conclude that Cox had the time and opportunity to warn Vaughan and Rayson that he was planning to use deadly force before he opened fire.

Although we are loathe to second-guess the decisions made by police officers in the field, we simply cannot

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twice at the truck, hoping to disable its engine. *See id.* The suspect was fatally wounded by the second shot. *See id.* The court held that, in light of all the information available to the officer, it was reasonable for the officer to conclude that the suspect posed an imminent threat of serious harm. *See id.* at 1333.

Finally, in *Scott v. Clay County*, 205 F.3d 867 (6th Cir. 2000), the police began pursuing a suspect who had raced through an intersection in contravention of a stop sign. 205 F.3d at 871. Rather than stop for the police, the suspect led them on a twenty-minute chase over rural roads at speeds ranging from eighty-five to one hundred miles per hour. *See id.* at 872. The driver testified that he forced at least one motorist off the road during the chase. *See id.* After the suspect's vehicle crashed into a guardrail and came to a stop, one of the pursuing officers parked and exited his cruiser to make an arrest. *See id.* The suspect's vehicle rapidly accelerated in the officer's direction, forcing the officer to leap out of the way to avoid being struck. *See id.* As the suspect sped at another police vehicle that was approaching the scene, the officer fired his weapon to stop the suspect's escape. *See id.* In holding that the officer acted reasonably in applying deadly force, the Sixth Circuit concluded that the record demonstrated that the suspect's "ongoing felonious misconduct posed an immediate threat to the safety of officers as well as innocent civilians." *Id.* at 877. Unlike the situations presented in *Smith, Cole,* or *Scott*, it is less clear in the instant case that Vaughan and Rayson presented a immediate threat of serious harm to the pursuing officers or other motorists.

conclude as a matter of law that a reasonable jury could not find that Deputy Cox's actions were objectively unreasonable. We note again that Deputy Cox disputes much of Vaughan's description of the events leading up to the shooting. For example, Cox maintains that the suspects rammed his vehicle, not one but twice and swerved as if to run him off the road before Cox fired his weapon. These assertions, if proven, would establish that Vaughan and Rayson represented a threat to Cox or others on the road and suggest that it was not feasible for Cox to give the truck's occupants prior warning. However, our obligation at this stage of the proceeding is to view all of the evidence in the light most favorable to Vaughan. Under this standard, genuine issues of material fact exist as to whether the suspects' flight was likely to endanger others on the road and whether Cox had the opportunity to warn Vaughan and Rayson before firing. Accordingly the district court erred in granting the defendants summary judgment on the basis that no Fourth Amendment violation occurred.

*Qualified Immunity*

We now turn to the question of whether Deputy Cox should be shielded from suit based on qualified immunity. As noted above, an officer is required to have probable cause to believe either that a suspect committed a crime involving the infliction or threatened infliction of serious harm or that the suspect presents a threat of serious physical harm before the officer can use deadly force. *See Garner*, 471 U.S. at 11, 12, 105 S. Ct. at 1701. The standard for resolving whether an officer who did not have the requisite probable cause to use deadly force should still be entitled to qualified immunity against suit is similar yet

distinct. *See Saucier v. Katz*, ___ U.S. ___, 121 S. Ct. 2151, 2158 (2001). Under the standard, an officer will be entitled to qualified immunity if he had "'arguable probable cause'" that the suspect either had committed a violent crime or presented a threat of serious harm. *Montoute v. Carr*, 114 F.3d 181, 184 (11th Cir. 1997). To find arguable probable cause, we must conclude that "the officer reasonably could have believed that probable cause existed." *Id.* We apply an objective standard, asking "whether the officer's actions are objectively reasonable in light of the facts confronting the officer, regardless of the officer's underlying intent or motivation." *Id.* at 183.

We conclude that a reasonable officer in Deputy Cox's position could have believed that he had sufficient probable cause to apply deadly force. At the time he fired his weapon, Cox had clearly demonstrated to the truck's occupants that he wanted them to stop and had seen the driver instead speed up to avoid apprehension. A reasonable officer in Cox's position could have concluded that the suspects, who were fleeing down a major highway at approximately eighty to eighty-five miles per hour in a pickup towing a trailer laden with two personal watercraft and apparently were not about to stop, posed a serious threat of harm to other motorists. Therefore, while a reasonable jury could find that Deputy Cox was mistaken in his belief that he had probable cause to use deadly force, we cannot say that a reasonable officer in Cox's position could not have believed that such probable cause existed.

We also conclude that the law was not sufficiently established on the day of the shooting that Deputy Cox knew that he needed to warn the occupants of the truck before firing his weapon. Qualified immunity provides

complete protection for government officials sued in their individual capacities as long as "their conduct violates no 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Lassiter v. Ala. A&M Univ.*, 28 F.3d 1146, 1149 (11th Cir. 1994) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982)). The law will not be deemed "clearly established" unless it was developed at the time of the alleged violation "in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that 'what he is doing' violates federal law." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039 (1987)). The pre-existing law must "truly compel (not just suggest or allow or raise a question about)" the conclusion that "what defendant is doing violates federal law *in the circumstances.*" *Id.* at 1150 (emphasis in original).

As noted above, the Supreme Court has held that a police officer must warn a suspect of the potential application of deadly force "where feasible." *See Garner*, 471 U.S. at 11-12, 105 S. Ct. at 1701. However, aside from establishing a broad mandate to provide some form of warning, the *Garner* Court made no effort to define under what factual situations such a warning would be necessary. Nor has the Supreme Court, this court, or the Supreme Court of Georgia held that a warning was necessary in factual circumstances similar to those in this case. *See Hamilton v. Cannon*, 80 F.3d 1525, 1532 n. 7 (11th Cir. 1996) (law can be clearly established in this circuit only by decisions of the U.S. Supreme Court, this court, or the highest court of the state from which the case arose). In short, the law was not defined in such a concrete way that a reasonable officer in Deputy Cox's position would have been compelled

to conclude that it was unconstitutional to fire his weapon without first warning Vaughan and Rayson. Accordingly, we affirm the district court's grant of summary judgment to Deputy Cox because he is protected by qualified immunity.

*Substantive Due Process*

We also conclude that Vaughan's alternative substantive-due-process claim based on Cox's alleged deliberately indifferent and conscience-shocking conduct lacks merit. The Supreme Court has held that in cases where police officers are required to make quick judgments about the proper course of action and therefore cannot deliberate before acting, even a showing that the officer's recklessness caused the plaintiff's injury is insufficient to support a substantive-due-process claim. *See County of Sacramento v. Lewis*, 523 U.S. 833, 853-54, 118 S. Ct. 1708, 1720 (1998). Instead, a violation of substantive due process will be found only when a plaintiff can show that the officer had "a purpose to cause harm unrelated to the legitimate object of arrest. . . . " *Id.* at 836, 118 S. Ct. at 1711. Vaughan has not presented any evidence to suggest that Cox's actions were motivated by anything but the desire to arrest Rayson and Vaughan. Accordingly, we affirm the grant of summary judgment to all defendants on Vaughan's substantive due process claim.

*Conclusion*

While we conclude that a reasonable jury could find that Deputy Cox's shooting of Vaughan was an unreasonable seizure and therefore unconstitutional, we affirm on

qualified immunity grounds the district court's grant of summary judgment to Cox on Vaughan's individual-capacity claim. We similarly affirm the grant of summary judgment to all defendants on Vaughan's alternative Fourteenth Amendment substantive-due-process claim. Because it found that no constitutional violation had occurred, the district court did not address whether a viable official capacity action could be brought against Deputy Cox or Sheriff Yeager, as well as whether the County could be held liable for Cox's actions.[9] We therefore vacate the judgments in favor of Cox and Yeager in their official capacity and the judgment in favor of the County and remand for the district court to address these issues in the first instance.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

NOONAN, Circuit Judge, dissenting:

Fred Lawrence Cox, an officer of the Coweta County Sheriff's Department in Coweta County, Georgia, drew his police cruiser parallel to a suspected thief driving a pickup on I-85, waited between thirty and forty-five seconds and then, having rolled down his window, discharged three rounds into the front seat of the pickup, wounding Jerry Charles Vaughan and paralyzing him for life.

The majority is of the opinion that Deputy Cox violated Vaughan's right under the Fourth Amendment to be

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[9] The parties disagree as to whether Sheriff Yeager is an officer of the County or an officer of the State of Georgia. It is not clear what entity is sued in Vaughan's official-capacity claims against Cox and Yeager.

free of unreasonable seizure by an agent of the state. The majority is also of the opinion that Cox had time to warn the occupants of the pickup that he would shoot if they didn't stop. But the majority holds as a matter of law that Cox would not have reasonably known that his shots were in violation of human rights secured by our Bill of Rights and made binding on the states by the Fourteenth Amendment.

Cox as a reasonable police officer is presumed to be familiar with *Tennessee v. Garner* 471 U.S. 1 (1985). He, therefore, knew:

1. That it is an unconstitutional use of force to shoot a residential burglar without warning, even if it is at night and the thief has a good chance of escaping. *Id.* at 4.

2. That such police behavior violates the Fourth Amendment even though a state statute authorizes the behavior. *Id.* at 5.

3. That such police behavior is unreasonable even though the police officer has to make a "difficult," even "split second" evaluation of "unknowable facts." *Id.* at 20.

Deputy Cox had particular reason to be acquainted with the appropriate standard because only four months before he shot Vaughan he had conducted a high speed chase of a pickup truck driven by a suspected burglar and then discharged his firearm into the pickup, wounding its passenger. It can scarcely have escaped the notice of his superiors or his own conscience that there were constitutional standards that govern the use of deadly force to seize a thief.

The majority says the Supreme Court has not established the circumstances under which a police officer will

find it feasible to give a warning before he shoots. Au contraire, *Tennessee v. Garner* has very clearly established that it is feasible to give a warning if the officer has time before he shoots, has no reason to believe that the suspect will shoot or otherwise injure him, and the reason for seizing the suspect by shooting is simply to prevent his escape.

*Tennessee v. Garner*, *supra*, was applied by the Second Circuit to a Waterbury, Connecticut policeman shooting an escaped felon without warning. *Davis v. Little*, 851 F.2d 605, 608 (2d Cir. 1988). *Garner* was not only applied but applied retroactively; the police shooting had occurred in 1981. *Id.* at 609. If a policeman in Connecticut in 1981 should have known what the constitution required, should not a policeman in Georgia in 1998?

*Garner* was a guide to the constitutionality of St. Paul, Minnesota police shooting a mentally disturbed man armed with a knife and engaged in bizarre behavior. *Ludwig v. Anderson*, 54 F.3d 465, 471 (8th Cir. 1995). The court noted the Supreme Court's words that a seizure by deadly force was "unmatched" in its intrusiveness on the human person and "frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment." *Id.* at 471 (quoting *Garner*, 471 U.S. at 9). The policeman is not to be both judge and executioner. The court noted the Supreme Court's teaching, "It is not better that all felony suspects die than that they escape." *Id.* (quoting *Garner*, 471 U.S. at 11). Law enforcement is not the supreme value. If these messages should have guided the police in Minnesota in a situation factually different from the apprehension of a thief at night, should they not have been equally clear to Deputy Cox?

To be sure, Cox's case is not on all fours with that of Memphis Police Officer Elton Hyman of *Tennessee v. Garner*. Few cases are on all fours with each other. Constitutional rights would be at the mercy of uncontrolled police if close factual similarity were required. The test, however, is not whether "the very action in question has previously been held unlawful," but whether, "in the light of pre-existing law the unlawfulness [is] apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). If it was unlawful in 1985 for a Memphis policeman to shoot without warning a suspected burglar fleeing at night, it was known to any reasonable Coweta County, Georgia sheriff's deputy in 1998 that it was contrary to the constitution of the United States to shoot three times in broad daylight into a vehicle carrying two human beings, who were probably thieves in flight but who certainly had lives more valuable than the property the policeman was so dangerously and so stupidly and so unconstitutionally seeking to protect.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-14380-II

JERRY CHARLES VAUGHAN,

Plaintiff-Appellant,

versus

FRED LAWRENCE COX, OFFICER, individually and in his official capacity as an officer of the Coweta County Sheriff's Department, COWETA COUNTY, GEORGIA MIKE YEAGER, SHERIFF, in his official capacity as Sheriff of Coweta County,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

(Filed Nov. 13, 2001)

Before CARNES, COX and NOONAN*, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Jerry Charles Vaughan is DENIED. Judge Noonan would grant the petition. No judge in regular active service on the court having requested that the court be polled on rehearing en

* Honorable John T. Noonan, Jr., U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ E.R. Cox
UNITED STATES CIRCUIT JUDGE

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**United States Court of Appeals**
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

**Thomas K. Kahn**
Clerk

In Replying Give Number
Of Case and Names of Parties

November 13, 2001

MEMORANDUM TO COUNSEL OR PARTIES

RE: 00-14380-II Jerry Charles Vaughn v. Fred Lawrence Cox
DC DKT NO.: 99-00006 CV-JTC-3

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The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,
THOMAS K. KAHN, Clerk
Reply To: Tonya Durnas
(404) 335-6178

Encl.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

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| JERRY CHARLES VAUGHAN,<br><br>Plaintiff<br><br>v.<br><br>OFFICER FRED LAWRENCE COX, individually and in his official capacity as an officer of the Coweta County Sheriff's Department, COWETA COUNTY, GEORGIA; and SHERIFF MIKE YEAGER, in his official capacity as Sheriff of Coweta County,<br><br>Defendants. | : | CIVIL ACTION NO.<br>3:99-CV-006-JTC |

ORDER

This case is before the Court on Defendants' Motion for Summary Judgment [#16-1], Motion to Supplement Plaintiff's Response to Defendants' Motion for Summary Judgment [#28-1], and Defendants' Motion to Exclude Plaintiff's Use of an Undisclosed Expert Witness [#30-1].

## I. BACKGROUND

During a high speed police chase on Interstate 85 during rush hour on the morning of January 5, 1998, Plaintiff Jerry Charles Vaughan was hit by a bullet fired by Defendant Deputy Fred Lawrence Cox into the fleeing truck in which Vaughan was a passenger. As a result of

this gunshot wound in his back, Plaintiff was immediately paralyzed from the chest down. Plaintiff has brought the instant suit against Deputy Cox, as well as Coweta County and Sheriff Yeager, arising out of this incident. Plaintiff claims that his Fourth Amendment rights were violated by Deputy Cox's use of excessive force on the morning in question and seeks recovery under 42 U.S.C. § 1983 and Georgia state law

Following extensions of the discovery period and of the time limitations for filing dispositive motions, Defendants moved for summary judgment on all of Plaintiff's claims against them. After receiving one extension of time in which to respond, Plaintiff opposed Defendants' motion. Approximately six weeks after the filing of this opposition and after the close of briefing on the summary judgment motion, Plaintiff moved to supplement his response to Defendants' motion by adding the affidavit of an additional fact witness, as well as the affidavit testimony of a second expert witness. Defendants vigorously oppose Plaintiff's attempt to supplement his summary judgment opposition and have filed a motion seeking to exclude the opinion of the second and previously undisclosed expert witness.

## II. SUMMARY JUDGMENT

### A. Summary Judgment Standard

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "The

district court should 'resolve all reasonable doubts about the facts in favor of the non-movant,' . . . and draw 'all justifiable inferences . . . in his favor. . . . '" *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437 (11th Cir. 1991).

The mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. An award of summary judgment requires that there be no *genuine* issue of *material* fact. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). An issue is not genuine if it is unsupported by evidence, or if it is created by evidence that is "merely colorable" or not significantly probative." *Id.* at 250. Similarly, a fact is not material unless it is identified by the controlling substantive law as an essential element of the non-moving party's case. *Id.* at 248.

In a case like this one, where the non-moving party will bear the burden of proof at trial, the movant may prevail by establishing that the non-moving party has no evidence to support an essential element of its case or by presenting affirmative evidence demonstrating that the non-moving party will be unable to prove its case at trial. *Young v. City of Augusta*, 59 F.3d 1160, 1170 (11th Cir. 1995).

### B. The Fourth Amendment

Plaintiff Vaughan claims that the Defendant Cox violated his rights pursuant to § 1983 by employing excessive and unreasonable force in firing shots at the fleeing truck in which he was a passenger. The Supreme Court has found that "all claims that law enforcement officers have used excessive force – deadly or not – in the

course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness standard.'" *Graham v. Connor*, 490 U.S. 386, 395 (1989). The Fourth Amendment to the United States Constitution provides:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .

Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a "careful balancing of 'the nature and quality of the intrusion on the individuals' Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. 386, 396 (1989). In connection with this balancing, the law has long recognized that the right to make an arrest necessarily carries with it the right to use some degree of physical coercion. *Id.*

There is no precise definition or mechanical formula, however, that can be used to determine the appropriate balance between the interests at stake with respect to a particular use of force. Instead, the Fourth Amendment test of "reasonableness" requires consideration of the facts and circumstances involved in each case, "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* (citing *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985) (the question is "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure.")).

The "reasonableness of a particular use of force must be judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* (citations omitted). With respect to a claim of excessive force, not every push or shove, even if it may later seem to have been unnecessary, violates the Fourth Amendment. *Id.* "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.* Therefore, the question is whether an officer's actions are "objectively reasonable" in light of the facts and circumstances confronting them without regard to their underlying intent or motivation. *Id.* at 397.

With respect to the use of deadly force such as Officer Cox employed in this case, the Supreme Court has explained:

> Where an officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction of serious physical harm or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

*Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985); *see also Acoff v. Abston*, 762 F.2d 1543, 1547 (11th Cir. 1985) (discussing circumstances in which use of deadly force is

constitutionally reasonable). The Constitution does not require law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can justifiably be used; "where deadly force is otherwise justified under the Constitution, there is no constitutional duty to use non-deadly alternatives first . . . " *Menuel v. City of Atlanta*, 25 F.3d 990, 996 (11th Cir. 1994) (quoting *Plakas v. Drinski*, 19 F.3d 1143, 1148-50 (7th Cir. 1994)).

### C. The Incident

At approximately 7:30 on the morning of January 5, 1998, Plaintiff Jerry Charles Vaughan was a passenger in a red Z-71 Chevrolet truck with a silver toolbox attached to the bed.[1] The truck was traveling north on I-85 from the Newnan area in the direction of Atlanta. The truck was hauling a trailer with two wave runners on it.

At the same time, the Coweta County Sheriff's Department received a call that a truck had been stolen from a gas station just off I-85 in Hogansville, Georgia. The stolen truck was described as a red Chevrolet Z-71 with a silver toolbox attached to the front portion of the truck's bed. It was believed to be heading north on I-85 toward Atlanta. The truck's thief was described to police as a white male wearing a white shirt.

Having heard this stolen vehicle report, Defendant Deputy Fred Cox of the Coweta County Sheriff's department

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[1] Consistent with the standards applicable to Defendant's motion for summary judgment, the facts set forth herein are either undisputed or viewed in a light most favorable to Plaintiff.

and Deputy Jeff Looney headed to I-85 in separate marked patrol cars. Soon thereafter, Defendant Cox began working a crash on the interstate. Deputy Looney pulled into the grassy median of I-85 to monitor traffic. Deputy Looney soon observed a red Chevy truck with a silver toolbox matching the description of the stolen vehicle report traveling north on the interstate. Deputy Looney pulled on to the interstate and followed the truck, while reporting his observations over the police radio.

The truck and Deputy Looney were heading toward the location where Deputy Cox was working the crash. Having heard Deputy Looney's report about the stolen truck over the radio, Deputy Cox radioed Looney and informed him that there was an accident up ahead of him and suggested that he wait to make any move with respect to the truck until after they had passed this accident to avoid any dangerous condition involving the stolen truck and the motorists involved in the crash.

When Deputy Looney and the red truck passed Deputy Cox on the interstate, he pulled out behind them and pursued the truck, leaving the accident site. Because the stolen vehicle report had not provided the deputies with a tag number and because it had not mentioned wave runners on the back of the truck, the deputies sought to confirm that the red truck matched the description of the stolen vehicle. Upon speeding up and passing the truck on the driver's side, Deputy Cox noted that the passenger was a white male wearing a white shirt and fit the description of the perpetrator of the theft of the truck.

After reporting this observation to Deputy Looney over the radio, Deputy Cox passed the truck and positioned his patrol car directly in front of it. At this point,

Deputy Cox's vehicle was positioned directly in front of the red truck with Deputy Looney following directly behind it. Both deputies testified in deposition that they activated their blue lights at this time in an effort to direct the truck to pull over. While Plaintiff disputes this fact and claims that neither officer activated his blue lights at this point, Plaintiff concedes that the officers made it clear by their actions that they were directing the truck to pull over. (Vaughan Deposition pp. 72, 75, 76, 80-81, 90). It is also undisputed that the truck did not pull over at that time in response to the deputies' actions. *Id.*

According to Deputy Cox, the truck sped up and tried to elude him instead of complying with his commands to pull over. Deputy Cox testified that the truck then rammed the back of his patrol car two times. At a speed of approximately 70 miles per hour, the impact from these collisions caused Deputy Cox to fight to maintain control of his car according to Cox. In addition, Deputy Cox maintains that the force of this collision caused at least one of the wave runners on the trailer attached to the truck to be catapulted off the trailer and to bounce dangerously along the interstate at a high rate of speed.

In his deposition, Plaintiff denied that the driver of the truck intentionally struck the patrol car riding in front of him. Rather, Plaintiff testified that the truck struck the car after the deputy applies his brakes, causing the car to slow and the truck to collide with it.[2] Further, Plaintiff

[2] The Court notes that Plaintiff's testimony regarding the officer's application of his brakes is consistent with the officer's testimony that he and Deputy Looney were using a rolling road block in an effort to slow the truck to a more moderate speed and effect a stop.

disputes that the wave runner became detached from the trailer following this initial impact, claiming instead that the wave runner was dislodged later in the chase.

Regardless of these inconsistencies that do exist between Plaintiff's testimony and that of the deputies pursuing the truck on that morning, it is undisputed that the red truck matching the description of the stolen truck made contact with Deputy Cox's marked patrol car at a high rate of speed after Deputy Cox and Deputy Looney signaled the truck to stop. It is also undisputed that the truck sped up and began driving recklessly following this impact in an effort to elude the officers. (Vaughan Deposition pp. 86-87, 90).

At this point, Deputy Cox decided to reposition his patrol car from the front to the back of the truck. Deputy Cox testified in deposition that he made this decision in an effort to extract himself from what he considered to be a life threatening situation driving in front of the truck that had just made contact with his car at approximately 70 miles per hour. Deputy Cox testified that he upholstered his gun and unrolled the passenger window of his vehicle before maneuvering his car to the left of the truck and slowing down to allow it to pass him. He explained that he did this to defend himself against the possibility that the speeding truck would make further aggressive moves in his direction.

While dropping back behind the truck and parallel to the truck on the driver's side, Deputy Cox fired three rounds from his gun at the truck. The deputy testified that he fired these shots in response to the truck's attempt to veer in the direction of his vehicle and side swipe his patrol car. Deputy Cox testified that he was aiming his

gun at the truck or the driver in an effort to stop the truck and eliminate the threat of danger to himself and other drivers on the road during the morning rush hour.

While Plaintiff concedes that the driver of the truck was driving recklessly at this point in time, Plaintiff denies that the truck made any aggressive move toward the patrol car while Deputy Cox was attempting to reposition himself behind the truck. Plaintiff claims that he put both of his hands out the passenger window of the truck in an attempt to demonstrate his surrender both before and after the initial shots were fired. Plaintiff claims that he was struck in the spine by the last bullet fired in this round of shots and immediately paralyzed.

Unfortunately, the chase did not end there. In a continued effort to avoid the police, the truck recklessly weaved in and out of traffic, colliding with other motorists in the process. The truck pulled off of exit 10 and proceeded through a busy intersection without slowing down – again colliding with innocent motorists on the road during the morning rush hour. At this point, both Parties agree that at least one of the wave runners had become detached from the trailer and was bouncing along the road behind the truck. The truck, with the deputies in pursuit, proceeded to drive back onto the interstate heading north toward Atlanta.

Given his concern for the lives of innocent motorists, especially in light of the heavier traffic as the chase approached the Atlanta area, Deputy Cox testified that he decided to attempt to get in front of the truck again. Cox again drew his weapon as he passed. Although Cox claims that the truck veered dangerously toward him on his first attempt to pass it, he testified that he dropped back

behind the truck without firing his weapon because the chase was approaching Southern State Auto Auction where he feared people would be located. During his next attempt to pass the truck, Deputy Cox testified that he fired his weapon to defend against aggressive maneuvering by the truck. Again, Deputy Cox was forced to drop back behind the truck.

When Deputy Cox was finally able to get to the front of the truck after it slowed in an apparent effort to surrender, the truck struck his patrol car again, causing him to spin out of control and ram into a steel guard rail at approximately 70 miles per hour. Deputy Cox was injured and his car was severely damaged.

Following this collision, the truck continued toward Atlanta dragging the trailer and wave runner. Finally, as the truck was trying to force its way between two vehicles traveling on the interstate, the driver lost control and the trailer jack knifed causing the truck to hit the cement median wall head on and eject the driver. Plaintiff was found in the car and was transported to a hospital for treatment due to his injuries. The driver of the truck also was taken to the hospital from which he escaped the next day.

Investigation revealed that the red truck in which Plaintiff was traveling was indeed the truck stolen from the Hogansville gas station earlier that morning. Both Plaintiff and the driver of the truck were charged with aggravated assault, fleeing and theft by taking. As of the time that Defendant's summary judgment motion was filed, the charges against Plaintiff remained pending.

**D. Analysis**

The first issue to be addressed by the Court in analyzing Defendants' motion is whether Plaintiff was subject to a "seizure" within the meaning of the Fourth Amendment when Deputy Cox shot him.

A "seizure" occurs within the meaning of the Fourth Amendment when there is a governmental application of physical force or, where that is absent, a show of authority to which the subject yields. *See California v. Hodari D.*, 499 U.S. 621, 626 (1991). The Fourth Amendment addresses only the "'misuse of power,' not the accidental effects of otherwise lawful governmental conduct." *Brower v. County of Invo*, 489 U.S. 593, 596 (1989) (citations omitted). Thus, it is clear that a Fourth Amendment seizure does not occur whenever there is a "governmentally caused termination of an individual's freedom of movement, nor even whenever there is a governmentally caused and governmentally desired termination of an individual's freedom of movement, but only when there is a governmental termination of freedom of movement **through means intentionally applied.**" ***Id.* at 596-97.**

The intentional shooting of a suspect by police is considered a "seizure" within the meaning of the Fourth Amendment. *See e.g., Menuel v. City of Atlanta,* 25 F.3d 990, 994-995 (11th Cir. 1994) (intransigent suspect was seized upon fatal shooting). In situations where a shooting is the accidental effect of intentional governmental conduct, however, courts have found no seizure as required by the Fourth Amendment. In *Puglise v. Cobb County, Georgia,* 4 F. Supp.2d 1172, 1179 (N.D. Ga. 1998) (Story, J.), a passenger in a pickup truck was shot twice during a high speed chase with police. In an effort to halt the

fleeing truck and defend against aggressive maneuvers by the truck, police fired a total of 54 rounds of ammunition during the chase, including some shots after the truck came to a halt. *Id.* 1177. The plaintiff passenger was hit by two of the bullets fired. *Id.*

Although the court found that the driver of the truck unquestionably was seized when the defendant officers fired shots to stop his flight and to defend against his actions, the court found that the passenger was not seized within the meaning of the Fourth Amendment when he was shot because the shooting of the passenger was "not the result of means intentionally applied to him." *Id.* at 1179. Accordingly, the court found no seizure to which Fourth Amendment protections were applicable until the passenger was physically removed from the truck and arrested. *Id.; see also Landol-Rivera v. Cruz Cosme,* 906 F.2d 791, 793-95 (1st Cir. 1990) (holding that hostage injured by police attempting to stop fleeing felon was not "seized" and could assert no Fourth Amendment claim: "It is intervention directed at a specific individual that furnishes the basis for a Fourth Amendment claim.").

Similarly, in this case, Deputy Cox testified that he fired shots at the truck and its driver in an effort to halt its perilous progress and to fend off offensive tactics by the driver. (Cox Deposition pp. 52-53). Although Cox testified that he considered the passenger as a suspect in the theft of the truck just like the driver, his testimony was unequivocal and undisputed that he fired shots aimed at the driver of the truck or the truck itself in order to end the truck's flight. Under these circumstances, therefore, the inadvertent shooting of Plaintiff was not the result of means intentionally applied to him. Like the passenger in *Puglise,* Plaintiff was not "seized" within the meaning of

the Fourth Amendment when Deputy Cox's bullet found him during the heated chase. Based upon this fact alone, Defendants are entitled to summary judgment with respect to Plaintiff's § 1983 claim.

Even assuming that Plaintiff suffered a seizure under the Fourth Amendment when he was shot during the chase, Deputy Cox's use of force during the high speed chase was objectively reasonable under the circumstances as a mater of law. Plaintiff disputes the testimony of both officers initially involved in the pursuit of the stolen truck that the officers activated their blue lights upon taking up positions directly in front of and behind the stolen vehicle. This dispute is not material for purposes of summary judgment, however, because Plaintiff concedes that the officers' actions – whether they activated their blue lights or not – made it clear that they were directing the truck to pull over. Plaintiff concedes that the driver of the truck made no effort to pull over at this time.

Plaintiff also disputes the testimony of Deputy Cox that the truck purposely rammed his vehicle twice from behind in an effort to elude the officers. Rather, Plaintiff testified that the truck rammed the patrol car after the officer applied his brakes because of the high rate of speed at which the vehicles were traveling and the close proximity of the policy car to the truck. The Court notes that this version of events is somewhat consistent with Deputy Cox's testimony that he and Deputy Looney were using a rolling road block in an effort slow the fleeing truck's speed. (Cox Deposition p. 41). Again, this dispute does not relate to a fact material to the resolution of Plaintiff's Fourth Amendment claims against Deputy Cox and the County. Regardless of the exact reason for the collision, it is undisputed that the stolen truck hit Deputy Cox's patrol

car at a speed of approximately 70 miles per hour after demonstrating its refusal to heed the officers' directions to stop.

In addition, Plaintiff disputes the testimony of Deputy Cox that the stolen truck purposely swerved in his direction in an effort to side swipe him as he attempted to drop back behind the truck. Plaintiff readily concedes, however, that the truck was driving in a reckless manner after the initial collision with Deputy Cox.

Accordingly, it is undisputed that Deputies Cox and Looney had probable cause to believe that the truck in which Plaintiff was a passenger was the truck reported stolen that morning. Indeed, it is undisputed that the truck in which Plaintiff was a passenger was in fact the stolen truck in question. Further, it is undisputed that Deputy Cox and Deputy Looney clearly indicated their desire that the truck pull over after locating it on Interstate 85. Plaintiff concedes that the truck made no effort to comply with this direction and, in fact, attempted to elude the officers. In addition, it is undisputed that the stolen truck rammed the back of Deputy Cox's patrol car at least one time at a speed of 70 miles per hour. There is no dispute that the truck was speeding down the interstate in a reckless manner at this point. Finally, the facts are clear that this incident occurred on Interstate 85 at approximately 7:30 a.m. during the morning rush hour when traffic is its heaviest.

As noted above, the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. Judging the incident from the perspective of a reasonable officer on the scene during the heated pursuit

and applying the factors relating to the use of deadly force as set forth by the Supreme Court, Deputy Cox was justified in using deadly force to prevent the truck's escape and to defend himself against what he reasonably perceived to be its aggressive maneuvers. After the stolen truck refused to stop in response to the officers' direction, rammed the deputy's patrol car at 70 miles per hour, and generally began driving in a reckless manner on the interstate during rush hour traffic while hauling two wave runners, Deputy Cox had probable cause to believe that the truck and its occupants posed a threat of serious physical harm, either to himself and Deputy Looney or to other innocent commuters regardless of the subjective intentions of the truck driver and of Plaintiff.[3] Even if the truck did not purposely swerve at Deputy Cox's car as he was trying to drop back into a position behind the truck, it was reasonable for Deputy Cox to believe that the driver of the truck was attempting to injure him in light of the previous collision between the two cars and the undisputedly reckless driving by the driver of the truck. Further, it was not feasible for Deputy Cox to warn the truck driver or its occupants prior to using deadly force in the context of a high speed chase along a crowded interstate. Accordingly, it was not constitutionally unreasonable to prevent

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[3] Although not relevant to the officer's decision to fire the first round of shots at the truck which injured Plaintiff, Deputy Cox's concern for his own safety and that of other drivers on the road was clearly justified in light of the truck's erratic and highly dangerous progress throughout the remainder of the chase. It is undisputed that the stolen truck – dragging at least one wave runner on the ground behind it – collided with several vehicles on the road and eventually caused Deputy Cox to lose control of his vehicle and crash into a guard rail, injuring the deputy and damaging his car.

the truck's escape and to defend himself by using deadly force. *See Smith v. Freland,* 954 F.2d 343, 347, (6th Cir. 1992) (officer acted reasonably in using deadly force to apprehend motorist who had fled from officer at speed of 90 miles per hour and who posed a threat to officer's safety); *Cole v. Bone,* 993 F.2d 1328 (8th Cir. 1993) (finding officer's use of deadly force reasonable when officer had probable cause to believe that plaintiff's truck had attempted to force several police cars off the road); *Parris v. Town of Alexander City,* 45 F. Supp. 2d 1295, 1303 (M.D. Ala. 1999) (finding police officers reasonable in firing shots at fleeing motorist where suspect had already injured one officer with his vehicle even if suspect had no intent to injure the officer and was merely trying to escape); *Puglise v. Cobb County,* 4 F. Supp. 2d 1172, 1180 (N.D. Ga. 1998) (Story, J.) (finding 54 rounds fired at truck without prior warning, including shots fired after truck came to a halt, objectively reasonable under the circumstances regardless of suspect's intent where officers reasonably believed suspect was driving "in a manner intended to injure them and other officers."); *Dudley v. Eden,* 49 F. Supp. 2d 581, 586-87 (N.D. Ohio 1999) (finding officer's conduct in firing shots at unarmed fleeing bank robber objectively reasonable after suspect attempted to flee the scene in his vehicle "creating danger for pedestrians and motorists alike.").

Because the undisputed facts regarding the high speed chase on the morning of January 5, 1998 reveal that Deputy Cox did not violate Plaintiff's Fourth Amendment rights as a matter of law, Defendant Deputy Cox is entitled to summary judgment. Furthermore, because the Court finds that Plaintiff suffered no constitutional violation at the hands of Deputy Cox, Defendants Yeager and

Coweta County are also entitled to summary judgment with respect to Plaintiff's derivative claims against them arising out of the same incident. *See Rooney v. Watson,* 101 F.3d 1378, 1381-82 (11th Cir. 1996) (no actionable claim for unconstitutional municipal policy or failure to train where there has been no constitutional violation), *cert. denied,* 522 U.S. 966 (1997).

The Court declines to exercise supplemental jurisdiction over Plaintiff's remaining state law claims in light of the failure of Plaintiff's federal cause of action. 28 U.S.C. § 1367(c)(3).

## III. CONCLUSION

Based upon the foregoing, Defendants' Motion for Summary Judgment [#16-1] is **GRANTED** with respect to Plaintiff's § 1983 claim. Plaintiff's remaining state law claims are **HEREBY DISMISSED**. The Clerk is **DIRECTED** to enter judgment accordingly. Because the Court did consider the supplemental materials filed by Plaintiff in deciding Defendants' motion for summary judgment, the Motion to Supplement Plaintiff's Response to Defendants' Motion for Summary Judgment [#28-1] is **GRANTED**. Defendants' Motion to Exclude Plaintiff's Use of an Undisclosed Expert Witness [#30-1] is **DENIED AS MOOT**.

**SO ORDERED**, this 22 day of July, 2000.

/s/ Jack Camp
JACK T. CAMP
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

JERRY CHARLES VAUGHAN

Plaintiff

vs.

OFFICER FRED LAWRENCE COX, (individually and in his official capacity as an officer of Coweta County Sheriff's department), COWETA COUNTY, GEORGIA And SHERIFF MIKE YEAGER (in his Official capacity as Sheriff of Coweta County

Defendants

CIVIL ACTION FILE
NO:
3:99-CV-006-JTC

STATE OF GEORGIA
COUNTY OF WHITFIELD

**AFFIDAVIT OF VANDIVER W. KELLER IN OPPOSITION OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

COMES NOW, before the undersigned officer authorized to administer oaths, VANDIVER W. KELLER, who upon being duly sworn states on oath as follows:

-1-

My name is Vandiver (Van) W. Keller. I reside in Rocky Face, Georgia I have been retained by Jeffrey J. Dean, attorney.

-2-

I make this affidavit based upon my own training, experience and education, and I am fully competent to testify to the matters contained herein.

-3-

My training and education in the areas of law enforcement has been as follows: Georgia State Patrol Basic Training School; Cobray International Counter-Terrorist Course; Personal instruction in techniques of Modern Pistolcraft from Barry Worrall of the American Pistol Institute; Federal Law Enforcement Training Center (FLETC) firearms instructor course; U.S. Army Elevated Urban Operations/Anti-Terrorist Course; U.S. Marshall Service Outlaw Motorcycle Gangs Seminar; Lethal Force Institute Advanced Police Survival Course; U.S. Army Advanced EUO/AT Course; Defense Training Inc., Advanced Firearms and Tactics Course; U.S. Army Hostage Rescue Course; Street Survival Police Training Seminars; Personal Protection Consultants, Police Training Davison, PR24 Police Baton Instructor Course; Control and Restraint Instructor Course; NRA Law Enforcement Rifle Instructor Course; Police Marksman Association Officer Survival Seminar; Street Survival II, The tactical Edge, Seminar; GSG9 (Germany) Counter-Terrorist Training (4 weeks); NRA Law Enforcement Submachine gun instructor; Georgia State Patrol Semi-Automatic Pistol transition; NRA Long Range Rifle Instructor Course; Heckler & Kock Advanced Submachine Gun course; Heckler & Koch dynamic entry course; ASLET National Training Conference; IALEFI Annual Training Conference; IPTM Interviews and interrogations Course; Bill Rogers Shooting School, Intermediate Handgun/Shotgun; Verbal Judo

Instructor Course; Georgia State Patrol In Service Training; Extensive Self-Education through state of the art books, manuals and magazines; competitive shooting with revolvers, pistols, shotguns, submachine guns and rifles; contact with other professional instructors nationwide and personal experimentation with new techniques.

-4-

My experience includes as follows twenty-five years as a Georgia State Trooper; GSP Special response Team Member for fourteen years; Tactical Firearms Instructor for Georgia State Patrol Special Response Team, 14 years; Officer Survival Instructor for Georgia State Patrol Basic Training School for five years; Professional Firearms Instructor for twenty-three years; Rated as expert on Georgia State Patrol Firearms qualifications; numerous top three finishes in local IPSC competition; Georgia State Patrol Troop A Top Marksman Award, First Place in the GSG9 Shooting Competition, Bonn, German. [sic] While I instructed at Cobray International for four years, I taught students from many different countries, including teaching through an interpreter. I was responsible for training all Georgia State Patrol personnel with high-risk assignments at the 1988 Democratic Convention including the Command Staff and Special Response Team. I have taught classes in several different states with my students including Federal Agents from the FB, DEA, ATF, NSA, U.S. Customs, NASA Security, U.S. Marines, U.S. Army SRT, British Royal Marines, Sheriff Departments, Police Departments (Including New York and Washington, D.C.), private security officers, armored car personnel, and private investigators. I have instructed students from thirty seven states and seven foreign countries at the

International Association of Law Enforcement Firearms Instructors annual training conference in Washington D.C. I have been a staff instructor at the American Society of Law Enforcement Trainers National Training Conference in Milwaukee Wisconsin. I was a staff instructor at IALEFI Annual Training conference in Tampa, Florida. I have appeared on the Law Enforcement Television Network (LETN). I have presented seminars to churches, hospitals, banks, schools, health clubs, colleges, corporations, state agencies, civic and professional organizations, as well as the general public. I have been a columnist on Officer Survival in the Georgia State Trooper Magazine. I have written articles and trade publications such as the *Police Marksman. The Firearms Instructor,* and *Combat Handguns.* I have been a consultant to the TechPak Corp. of New York City in matters of firearms training and equipment for three years. I have taught as an adjunct instructor for the IPTM, Institute of Police Training and Management in Jacksonville, Florida. I have appeared in Court as an expert in Police Procedures in the use of deadly force. I have written and produced an internationally marketed instructional video tape: Weaponcraft Kata-Dryfire Training System. I have been involved in over a hundred motor vehicle pursuits and have discharged my weapon in the line of duty.

-5-

I have been certified in the following areas: Federal Law enforcement Training Center Firearms Instructor; National Rifle Association Law Enforcement Handgun Instructor; National Rifle Association Law Enforcement Shotgun Instructor; National Rifle Association Law Enforcement Rifle Instructor; National Rifle Association

Law Enforcement Submachine Gun Instructor; Georgia Peace Officers Standards and Training Firearms Instructor; Georgia Board of Private Detectives and Securities Agencies Instructor; Personal Protection Consultants PR24 Police Baton Instructor; Personal Protection Consultants Control and Restraint Instructor; NAUI Law Enforcement Search and Rescue SCUA Diver; Verbal Judo Institute Instructor.

-6-

I am a member of the following law enforcement related associations: Former Member of the Board of Directors of the International Association of Law Enforcement Firearms Instructors; Southern States Police Benevolent Association; American Society of Law Enforcement Trainers; National Rifle Association; Police Marksman Association; National Association of tactical Officers; American Women's Self-Defense Association; American Association of State Troopers.

-7-

At the request of Plaintiff's counsel, I have reviewed the following materials in the above styled case:

(1) Deposition of Plaintiff, Jerry Vaughan;

(2) Deposition of Defendant, Fred Lawrance Cox;

(3) Deposition of Sheriff Mike Yeager;

(4) Deposition of Jeff Looney, Deputy;

(5) Deposition of Ernest Tobin;

(6) Deposition of James E. White;

(7) GBI Investigation File, investigation of the shooting of Plaintiff Jerry Vaughan by Defendant Cox;

(8) Georgia Post Training Standards for pursuits and use of deadly force;

(9) Coweta County written policy manual regarding use of deadly force and pursuits;

(10) International Chiefs of Police Association Training Keys on high speed pursuits and use of force;

-8-

I have been asked to resolve conflicts, should they be found to exist, in the factual testimony of the witnesses, including the parties, in a light most favorable to the Plaintiff. However, many of the opinions expressed in this affidavit hold true whether or not you believe the testimony rendered by the Plaintiff. Defendant Cox, or Deputy Looney. Based upon my review of the material described above, together with my education, training and experience, and assuming the facts and circumstances as presented to me in the above referenced material, I hold the following opinions to a reasonable degree of certainty within my areas of expertise in the field of police operations and procedures, high speed vehicle pursuits, and use of deadly force:

(a) The shooting of Plaintiff Jerry Vaughan by defendant Fred Cox was a violation of well established Georgia Law, a violation of Coweta County Department policy, and a violation of well established standard law enforcement procedures recognized both in Georgia and Nationally.

The shooting of Plaintiff Vaughan by Defendant Cox was not justified for the following reasons:

(b) Plaintiff Vaughan offered absolutely no threat of deadly force to Defendant Cox or anyone else in order to justify his shooting. In fact, Plaintiff Vaughan visibly showed his intention to surrender to Defendant Cox. Georgia Law, Coweta County Department Policy, and standard law enforcement procedures all state that use of deadly force requires a threat of deadly force by the victim with the victim having the ability to carry out the deadly force, the opportunity to carry out the deadly force and there must be true jeopardy, where the officer has a true fear for his life. None of these were present in this case.

(c) It is a well established and long recognized principle of law enforcement procedure that a car is not to be considered a deadly weapon which would justify the use of deadly force when the law enforcement officer is also in a car. Therefore, even if you assume the testimony of Defendant Cox as true, and even if you assume that his conduct prior to the shooting was proper, (which it was not), any aggressive movements by the subject pickup truck in which Plaintiff Vaughan was a passenger would not have justified the use of deadly force against either the driver or the passenger.

(d) The actions of Defendant Cox in conducting the pursuit at issue were in violation of Coweta County Department Policy and nationally recognized standards of law enforcement procedures. According to Coweta County policy, Georgia policy, and national standards, a law enforcement officer is not to put himself in a situation involving unreasonable danger by placing himself beside a

pursued motor vehicle during a chase. Defendant Cox's actions of placing his patrol car in front of the moving pickup truck and slowing down, and then when bumped, moving to the side of the pickup truck, violating Coweta County policy and rationally recognized standards, cannot be used as a justification for using deadly force. It should be noted that Deputy Jeff Looney, who also was involved in the chase of the subject pickup truck for a much longer period of time than Defendant Cox, never fired his weapon or used any manner of deadly force against said pickup truck in which Plaintiff was a passenger.

(e) Defendant Cox was not justified under any grounds to use deadly force in this situation because, among other factors, at the time of his firing of both series of shots, he had no positive identification of the stolen vehicle and was not sure that he had the right vehicle. While he did have grounds to make a stop, he did not have grounds to shoot. The crime involved was a non-violent property crime. Even under the facts as alleged by Defendant Cox, this was not justification for using deadly force to apprehend the suspects, even if he had a positive identification.

(f) Based upon my training and experience, if any reasonable officer truly believes his life to be in danger after being put in a particular situation, that officer will do everything in his power to remove himself from that situation and avoid being placed in a similar situation again. The fact that Defendant Cox placed his vehicle alongside the subject pickup truck at least three times, firing twice and stating that he should have fired a third time, clearly evidences that Defendant Cox had no real fear for his life at the time.

(g) Coweta County Policy, Georgia policy and nationally recognized standards of police procedure state that use of deadly force should only be used when all other means of defense have failed. In this particular case, absolutely no other means of defense were used by Defendant Cox prior to his use of deadly force. Instead, Defendant Cox went straight to the top of the "force continuum". Coweta County Policy, Georgia policy and nationally recognized standards of police procedure dictate that use of deadly force can only be justified by the facts known to the officer at that particular time. It is completely improper to attempt to justify a shooting by using knowledge of facts gained after the shooting.

(h) Defendant Cox violated Coweta County policy in his pursuit by failing to use his siren at any time. Coweta County policy dictates that the lights and siren must be used in a pursuit. Use of the siren itself is a non-violent warning to the suspect and in this case, should have been used prior to use of deadly force.

(i) Coweta County policy dictates that Officers involved in a motor vehicle pursuit should maintain a safe distance between their vehicle and the pursued vehicle and that physical contact between the vehicles will not be justified. Under the facts as alleged by Plaintiff, Defendant Cox's hitting his brakes when in front of this pickup truck was improper and in violation of Coweta County policy. Coweta County policy dictates that Officers involved in a motor vehicle pursuit should maintain a safe distance between their vehicle and the pursued vehicle and that physical contact between the vehicles will not be justified. Under the facts as alleged by Plaintiff, Defendant Cox's hitting his brakes when in front of this pickup

truck was improper and in violation of Coweta County policy.

(j) In order to justify use of deadly force, the suspect must present a threat of deadly force with the ability to inflict death or serious bodily injury, the opportunity to do so, and the officer must truly feel in jeopardy for his life. In the case at issue, Plaintiff Vaughan had no ability to use deadly force, and as long as defendant Cox remained in his patrol car, it is highly unlikely that the driver of the pickup truck, by use of the pickup truck only, had any ability to inflict death or serious bodily injury. Even if the pickup truck at issue could be considered a deadly weapon, the only time the driver of the pickup truck would have had the opportunity to use it as a deadly weapon, would have been when Officer Cox negligently placed himself beside or in front of said pickup truck. A law enforcement officer cannot provide the opportunity for the subject to use deadly force as a justification for the officers use of deadly force. Further, as discussed above, the facts of this case strongly evidence that no reasonable officer would have truly felt his life in jeopardy at the times Defendant Cox fired his weapon into the suspect pickup truck.

(k) I have been aware of nationally recognized standards of police procedure or of law enforcement procedure since 1981 that a law enforcement officer should not fire from a moving vehicle at a moving vehicle. While there are certain limited scenarios when shooting out of or into a moving vehicle might be justified, the circumstances surrounding this case, even if the facts as alleged by Defendants are considered to be true, are not even close to justifying a shooting in this case.

(l) Both Georgia standards of police procedure and nationally recognized standards dictate that incidental contact or bumping between vehicles involved in a high speed pursuit are not to be considered justification for the use of deadly force.

(m) Further, Georgia P.O.S.T. standards and nationally recognized standards state that firearms are not to be used against high speed or reckless drivers. The officers have no right to assume that others will be killed if the perpetrator is not stopped.

(n) It is a nationally recognized standard that law enforcement officers are generally not required to do anything they are not trained for. Based on all of the evidence I have reviewed, and my knowledge of law enforcement training in Georgia, including S.W.A.T. training in Georgia, Defendant Cox has never been trained to fire from a moving vehicle or into another moving vehicle. Nor has he been trained to perform a rolling roadblock. In weapons training, the state of Georgia uses a computer system involving hundreds of potential scenarios. There is no situation in this training system in the State of Georgia that trains a law enforcement officer to shoot from a moving vehicle and into a moving vehicle.

(o) There was absolutely no reason to use deadly force in the pursuit and shooting at issue in this case. Defendant Cox and Coweta County should have been aware that resources were available to them from Georgia State patrol and other agencies, including providing lookouts, stop sticks, and air support. A red four wheel drive Z-71 pickup truck with a tool box and a trailer pulling jet skis would not have been difficult at all to keep track of under the circumstances at issue. More than

likely, if Defendant Cox had never fired and stayed behind the suspects, they could have been apprehended without incident.

(p) The opinions I have set forth in this affidavit regarding nationally recognized standards of use of force are so widely established and well recognized in the law enforcement community, that Coweta County Sheriffs Department should have known that Defendant Cox's shooting was improper.

(q) In the incident that occurred in September 1997, where Defendant Cox was involved in another high speed pursuit involving a property crime in which he fired his weapon from his moving vehicle and into another moving vehicle striking another passenger was so improper and in violation of standards of police procedure recognized in Georgia and nationally, that Coweta County Sheriff's Department should have known that said shooting was improper.

(r) The fact that Defendant Cox was never disciplined or retrained by the Coweta County Sheriffs Department as a result of the September, 1997, shooting incident evidences an obvious intentional disregard for the rights of potential arrestees of Coweta County Sheriffs Department. The fact that Defendant Cox has never been disciplined or retrained as a result of either shooting incident, together with the fact that he has not even been told by anyone with the Coweta County Sheriff's Department that his actions were improper in these two shooting incidents clearly show a callous disregard for proper police procedure and civil rights of potential arrestees.

Both shooting instances required, at a minimum, retraining of Officer Cox in the use of deadly force, and closer supervision.

**Further this affiant saith not.**

/s/ Vandiver W. Keller
VANDIVER W. KELLER,

Sworn to and subscribed before
me this 23 day of March 2000.

/s/ Brenda Nix
NOTARY PUBLIC

My commission expires:
Notary Public Murray County, Georgia
My Commission Expires Dec. 6, 2000

(2)

Supreme Court, U.S.
FILED
MAY 2 2003
OFFICE OF THE CLERK

No. 02-1460

In The

# Supreme Court of the United States

JERRY CHARLES VAUGHAN,

*Petitioner,*

v.

FRED LAWRENCE COX , OFFICER, Individually and in his official capacity as an Officer of the Coweta County Sheriff's Department; COWETA COUNTY, GEORGIA; MIKE YEAGER, SHERIFF, in his official capacity as Sheriff of Coweta County,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## RESPONDENTS' COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the Court of Appeals correctly applied settled qualified immunity law, most recently articulated by this Court in *Hope v. Pelzer*, 536 U.S. 730 (2002), in holding that, as of January 5, 1998, it was not clearly established that shooting to disable a fleeing vehicle or its driver was an unconstitutional application of deadly force under the circumstances of this case, where even the plaintiff passenger admitted that the vehicle posed an immediate danger to the lives and safety of innocent motorists in its path.

## LIST OF PARTIES

Jerry Charles Vaughan, Petitioner-Plaintiff

Fred Lawrence Cox, Respondent-Defendant

Sheriff Michael Yeager, in his Official Capacity, Respondent-Defendant

Coweta County, Georgia, Respondent-Defendant

TABLE OF CONTENTS

Page

RESPONDENTS' COUNTER-STATEMENT OF THE QUESTION PRESENTED ..... i

LIST OF PARTIES ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... iv

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION ..... 1

INTRODUCTION ..... 1

STATEMENT OF THE CASE ..... 2

REASONS FOR DENYING THE WRIT ..... 7

A. The Eleventh Circuit's opinion on remand properly applies the qualified immunity analysis set out by this Court in *Saucier v. Katz*, *Anderson v. Creighton*, and, most recently, *Hope v. Pelzer* ..... 7

B. The Eleventh Circuit did not hold that *Tennessee v. Garner*'s general requirement that an officer give a warning before using deadly force "where feasible" is "incapable" of providing fair notice for qualified immunity purposes ..... 11

C. The Eleventh Circuit's opinion does not conflict with the opinions of other federal appellate courts ..... 14

D. No issue of "great importance" is raised by the Eleventh Circuit's determination that state and local police procedure standards did not establish constitutional minimums in this case... 18

CONCLUSION ..... 20

## TABLE OF AUTHORITIES

Page

*Anderson v. Creighton*, 483 U.S. 635 (1987) ..... 7, 8

*Barlow v. Ground*, 943 F.2d 1132 (9th Cir. 1991) ..... 17

*Bray v. County of San Diego*, No. 93-55446, 1994 U.S. App. LEXIS 4289 (9th Cir. Mar. 2, 1994) ..... 16

*Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993) ..... 15, 18

*Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), *cert. denied*, 536 U.S. 958 (2002) ..... 16

*Dixon v. Richer*, 922 F.2d 1456 (10th Cir. 1991) ..... 17

*Estate of Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993) ..... 14

*Graham v. Connor*, 490 U.S. 386 (1989) ..... 13, 14

*Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998) ..... 17

*Hope v. Pelzer*, 536 U.S. 730 (2002) ..... *passim*

*McCaslin v. Wilkins*, 183 F.3d 775 (8th Cir. 1999) ..... 15

*Mitchell v. Forsyth*, 472 U.S. 511 (1985) ..... 8

*Posr v. Doherty*, 944 F.2d 91 (2d Cir. 1991) ..... 17

*Rosales v. City of Phoenix*, No. 99-17204, 2001 U.S. App. LEXIS 27599 (9th Cir. Dec. 26, 2001), *cert. denied*, 123 S. Ct. 109 (2002) ..... 16

*Saucier v. Katz*, 533 U.S. 194 (2001) ..... *passim*

*Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992) ..... 18

*Tennessee v. Garner*, 471 U.S. 1 (1985) ..... *passim*

*Thomas v. Roberts*, No. 00-11361, 2003 U.S. App. LEXIS 4153 (11th Cir. Mar. 10, 2003) ..... 9

TABLE OF AUTHORITIES – Continued

Page

*United States v. Bradley,* 196 F.3d 762 (7th Cir. 1999) ..... 14

*United States v. Lanier,* 520 U.S. 259 (1997) ..... 7, 9

*Willingham v. Loughnan,* 321 F.3d 1299 (11th Cir. 2003) ..... 9

*Wilson v. City of Des Moines,* 293 F.3d 447 (8th Cir. 2002) ..... 15

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

Respondents, Deputy Sheriff Fred Lawrence Cox (in his individual and official capacity), Sheriff Michael Yeager (in his official capacity) and Coweta County, Georgia, respectfully submit this brief in opposition to the petition for writ of certiorari.

## INTRODUCTION

On remand from this Court to reconsider its prior opinion in light of *Hope v. Pelzer*, 536 U.S. 730 (2002), the Eleventh Circuit held that Deputy Cox was entitled to qualified immunity under the circumstances of this case. In so holding, the Eleventh Circuit did not fail to follow *Hope v. Pelzer*, nor did it decide any important, unsettled question of federal law or create any conflict among the circuit courts. The petitioner attempts to suggest otherwise only by erroneously characterizing the opinion below as if it did several things it did not.

First, the opinion below did not, as petitioner contends, apply an "improperly rigid analysis," inconsistent with the *Hope* decision, to its qualified immunity determination. To the contrary, as is clear from the face of the opinion, the Eleventh Circuit properly recognized the principles set out in *Hope* and applied those principles in determining that Deputy Cox is entitled to qualified immunity under the circumstances of this case.

Second, the opinion below did not, as petitioner contends, determine that the requirement of *Tennessee v. Garner*, 471 U.S. 1 (1985), that an officer give a warning "where feasible" before using deadly force is inherently

"incapable" of providing fair warning that specific conduct is unconstitutional. Instead, the Eleventh Circuit held merely that *Garner* did not place Deputy Cox on notice that a warning was required under the circumstances of this case.

Third, the opinion below does not, as petitioner contends, conflict with decisions of the other circuit courts. The various cases cited by petitioner merely deny summary judgment based on materially different facts, and do not reflect a split among the circuits.

Fourth, the opinion below does not, as petitioner contends, establish that courts can ignore standards of police procedure in cases where those standards articulate constitutional minimums. To the contrary, the Eleventh Circuit's opinion merely reflects the fact that, in this case, petitioner failed to establish that the police standards he cited reflected constitutional minimums, as opposed to policy concerns.

Ultimately, the opinion below simply applied established qualified immunity law to the particular facts at issue. There is no issue warranting review on certiorari.

## STATEMENT OF THE CASE

In a high-speed interstate chase on January 5, 1998, the petitioner, Jerry Charles Vaughan, was paralyzed by a bullet fired by Deputy Cox of the Sheriff's Department of Coweta County, Georgia. At the time, Vaughan was a passenger in a stolen truck that, as he admits, was recklessly fleeing police pursuit, endangering the lives and safety of other motorists during the morning rush hour

heading into Atlanta, Georgia. Deputy Cox hit Vaughan in an attempt to disable either the truck or the driver. Pet. App. 14.

The chase started when Deputy Cox and fellow deputy sheriff, Jeff Looney, received a report of a stolen truck heading north on I-85 towards Atlanta. Officers Cox and Looney soon observed a truck matching this description. Pet. App. 12-13, 37-38. Vaughan does not dispute that the officers had probable cause to believe that this was the stolen truck, as, in fact, it was. *Id.* at 42, 46. Nor does Vaughan deny that he and the driver stole that truck, as well as an attached trailer, two "waverunners" and another truck that they had earlier abandoned. Instead, he pleaded the Fifth Amendment.

After confirming that the occupants and the truck met the reported description, the officers attempted to stop the truck through a "rolling roadblock." Pet. App. 13, 38-39. Deputy Cox positioned his patrol car in front of the truck, with Officer Looney following the truck from behind. *Id.* Vaughan admits that, at least by this time, it was clear that the officers wanted the truck to pull over. *Id.* Deputy Cox then slowed down in an effort to induce the truck to reduce its speed. He testified that the truck rammed the back of his patrol car, almost causing him to lose control of his vehicle. *Id.* Although Vaughan disputes that the driver intentionally rammed Deputy Cox's patrol car, it is undisputed that, instead of slowing down for the rolling roadblock, the truck struck his vehicle at least once from behind. *Id.*

There is also no dispute that the driver refused to stop even after striking Deputy Cox's patrol car. Pet. App. 13, 40. Instead, as Vaughan admitted at his deposition (p. 89),

the truck was "clearly trying to elude the police." Vaughan also admitted that the driver's reckless operation of the truck following this impact threatened the safety of other motorists:

> Q. Okay. Obviously [the driver is] going over the speed limit, correct?
>
> A. Yes, sir.
>
> Q. He's weaving in and out of traffic, correct?
>
> A. Yes, sir.
>
> Q. And he has wave-runners on the back of his vehicle, correct?
>
> A. Yes, sir.
>
> Q. So he's driving in a dangerous manner at this time frame, isn't he?
>
> A. Yes, sir.
>
> Q. And he's driving in a reckless manner, correct?
>
> A. Yes, sir.
>
> * * *
>
> Q. And he was putting other citizens on the interstate driving that morning in danger, correct?
>
> A. Yes, sir.

Vaughan Dep., pp. 87-88; Pet. App. 40. Moreover, Vaughan concedes that the driver was driving in this reckless and dangerous manner before Deputy Cox fired the first shot:

> Q. So when the police turned the lights on, you took off?

A. He [the driver] did. In other words, he sped up faster.

Q. Right. So before the shots are fired, he speeds up, correct?

A. When he [the police] turns the blue lights on, we speed up to probably about 80 or 85.

Q. So in effect, before shots are fired, he speeds up to avoid the police, correct?

A. Basically.

Q. Okay. And he's going 80 miles an hour now before shots are fired, correct?

A. Yes, sir.

Q. And it's clear at this point that he's trying to elude the police, correct? They got the lights on, and he, instead of slowing down, is speeding up, correct?

A. Yes, sir.

Q. And he's got wave-runners on the back of his truck, correct?

A. Yes, sir.

Q. And he's going 80 miles an hour with wave-runners on the back of his truck, correct?

A. Yes, sir.

Q. And there's other vehicles on the road and on the interstate that morning; is that correct?

A. That's correct.

Q. So he's driving before shots are fired in a dangerous manner, correct?

A. Yes, sir.

Q. Okay. And he's driving wrecklessly [sic] at that point, correct?

A. Yes, sir.

Q. And then based on your recollection of the chronology of the events, shots are fired, correct?

A. That's correct.

Vaughan Dep., pp. 89-91; Pet. App. 40, 46.

By this point, Deputy Cox had dropped back alongside the driver's side of the truck. He testified that the driver veered aggressively in his direction, attempting to side-swipe his patrol car. Pet. App. 40. He then fired three bullets at the truck, trying to disable the truck or the driver. *Id.* at 14. One of these shots struck Vaughan, paralyzing him from the waist down.[1] Vaughan disputes that the truck swerved toward Deputy Cox's patrol car, but, as noted above, he does not dispute that the truck was endangering the lives and safety of other motorists in its path before Deputy Cox fired his weapon. *Id.* at 40, 46.

The chase did not end after that first volley of shots. The truck continued to weave recklessly in and out of traffic at high speeds, colliding with other motorists. Pet. App. 41. At one point, the truck pulled off the interstate at

[1] Vaughan initially claimed that he was struck by a second volley of shots that occurred much later in the chase. But, facing summary judgment, Vaughan changed his story to claim that this first volley of shots struck him. For the purposes of the appeal below and this petition, we assume that his current account is true.

an exit, barreled through a busy intersection at high speed, running a stop sign and again colliding with innocent motorists. *Id.* Finally, while trying to force its way between two vehicles, the driver lost control and crashed. *Id.* at 42.

## REASONS FOR DENYING THE WRIT

### A. The Eleventh Circuit's opinion on remand properly applies the qualified immunity analysis set out by this Court in *Saucier v. Katz*, *Anderson v. Creighton* and, most recently, *Hope v. Pelzer*.

In *Hope v. Pelzer*, 536 U.S. 730 (2002), this Court confirmed its previous formulations of qualified immunity doctrine in *Saucier v. Katz*, 533 U.S. 194 (2001), and *Anderson v. Creighton*, 483 U.S. 635 (1987), repeatedly citing to both decisions. The *Hope* decision reaffirmed that, in determining whether a state actor had "fair warning" that his actions were unconstitutional, "general statements of the law are not inherently incapable of giving fair and clear warning." 536 U.S. at 741, *citing United States v. Lanier*, 520 U.S. 259, 270-71 (1997).

As the *Hope* opinion states:

> [Q]ualified immunity operates to ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful. For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has

> previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

536 U.S. at 739 (internal quotations omitted), *citing Saucier*, 533 U.S. at 206; *Anderson*, 483 U.S. at 640; *Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12 (1985).

This case was remanded to the Eleventh Circuit for reconsideration in light of *Hope*. In its opinion on remand, the Eleventh Circuit recited that:

> In determining whether the contours of a constitutional right are clearly established, we examine cases that announce general constitutional rules or apply those rules to factual circumstances to determine if a reasonable public official, who is charged with knowledge of such opinions, would have understood the constitutional implications of his conduct. With regard to this inquiry, the Supreme Court in *Hope* cautioned that we should not be unduly rigid in requiring factual similarity between prior cases and the case under consideration. The "salient question," the Court said, is whether the state of the law gave the defendants "fair warning" that their alleged conduct was unconstitutional.

Pet. App. 3-4, *citing Hope*, 536 U.S. at 741. Despite the Eleventh Circuit's clear acknowledgement of the import of the *Hope* decision, petitioner asserts that the Eleventh Circuit applied an "improperly rigid analysis" of qualified immunity on remand. However, this assertion reflects a misreading of the Eleventh Circuit's holding.

The Eleventh Circuit did not hold that qualified immunity is available in the absence of a prior case with closely similar facts. To the contrary, the Eleventh Circuit

explicitly recognized that, "a general constitutional rule 'may apply with obvious clarity to the specific conduct in question.'" Pet. App. 5, *citing Lanier*, 520 U.S. at 271. The Eleventh Circuit went on to hold only that "the rule announced in [*Tennessee v.*] *Garner*, [471 U.S. 1 (1985), the only authority on which Petitioner relied in his qualified immunity analysis,] does not apply with 'obvious clarity' to Deputy Cox's conduct *in this case*." Pet. App. 5 (emphasis added). Thus, the Eleventh Circuit properly considered the qualified immunity question in light of the principles articulated in *Hope*.[2]

Petitioner continues to argue that, because the Eleventh Circuit held that a jury could find Deputy Cox's conduct unconstitutional, the finding of qualified immunity was improper. But this ignores the established distinction between the analysis of whether a constitutional violation has occurred, on the one hand, and whether a

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[2] Citing two other decisions of the Eleventh Circuit in cases remanded in light of *Hope*, petitioner asserts broadly that the Eleventh Circuit "continues to *require* cases with materially similar facts." Pet. App. 11 (emphasis in original). Neither of the cases cited by petitioner supports this argument. To the contrary, in both of the cases cited by petitioner, as in this case, the Eleventh Circuit recognized and applied the qualified immunity principles set out in *Hope*. *See Willingham v. Loughnan*, 321 F.3d 1299, 1301 (11th Cir. 2003) ("The Supreme Court in the *Hope* opinion stresses that preexisting caselaw with 'materially similar' or 'fundamentally similar' facts is not always necessary to give an official 'fair warning' of unlawful behavior. 122 S. Ct. at 2516.... General statements of the law contained within the Constitution, statute or caselaw may sometimes provide 'fair warning' of unlawful conduct."); *Thomas v. Roberts*, No. 00-11361, 2003 U.S. App. LEXIS 4153, at *15 (11th Cir. Mar. 10, 2003) ("Factually similar cases are not *always* necessary to establish that a government actor was on notice that certain conduct is unlawful.") (emphasis in original).

state actor is entitled to qualified immunity, on the other hand. As this Court held in *Saucier*:

> The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, . . . the officer is entitled to the immunity defense.

533 U.S. at 205. The Eleventh Circuit's application of the two-part inquiry set out in *Saucier* – first, considering whether the conduct at issue could be found unconstitutional, and only then considering whether the officer was entitled to qualified immunity – to the facts of this case raises no issue worthy of a grant of certiorari.[3]

At bottom, the Eleventh Circuit correctly identified and applied the principles of qualified immunity set out in *Hope*. Petitioner's real quarrel is with the Eleventh

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[3] The petitioner also argues that the Eleventh Circuit's opinion "provides no guidance" for future cases. This argument misconstrues the Eleventh Circuit's opinion, which, as petitioner acknowledges, held that a jury could find conduct such as Deputy Cox's to be unconstitutional. As *Saucier* requires, *see* 533 U.S. at 201, the Eleventh Circuit first analyzed the constitutionality of Deputy Cox's conduct, and only reached the qualified immunity question after it had determined that Deputy Cox's conduct could be found unconstitutional.

Circuit's particular determination that the general constitutional rule set out in *Tennessee v. Garner* did not apply with "obvious clarity" to Deputy Cox's conduct *in this case*. This case-specific determination presents no issue of "extreme importance" worthy of a grant of certiorari.

**B. The Eleventh Circuit did not hold that *Tennessee v. Garner*'s general requirement that an officer give a warning before using deadly force "where feasible" is "incapable" of providing fair notice for qualified immunity purposes.**

*Tennessee v. Garner*, 471 U.S. 1 (1985), set out general constitutional parameters for the use of deadly force to stop a fleeing felony suspect. Such force is constitutionally permissible, *Garner* holds, if (1) "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others," (2) such force is "necessary to prevent escape," and (3) "where feasible, some warning has been given." *Id.* at 11-12. In his second argument, petitioner asserts that the Eleventh Circuit's opinion somehow establishes as a matter of law that the warning requirement of *Garner* is inherently "incapable" of providing fair notice that an officer's conduct violates the constitution. Pet. 16-19.

Again, petitioner misreads the Eleventh Circuit's holding. As is clear from the opinion, the Eleventh Circuit did not hold that *Garner* could not provide "fair notice" that a state actor's conduct was unconstitutional in an appropriate case; it merely held that the *Garner* rule did not provide "fair notice" in *this* case. As the Court held:

> The *Garner* rule does not *always* provide a clear answer as to whether a particular application of

> deadly force will be deemed unjustified by the courts. Whether Deputy Cox had arguable probable cause, whether deadly force was necessary to prevent Vaughan's escape, and whether a warning was feasible *in the instant case* are all questions that the general *Garner* rule does not clearly answer. Because the *Garner* rule, standing alone, does not apply with obvious clarity such that Deputy Cox was given fair warning that his alleged conduct was unconstitutional, we must consider whether, in light of *Hope*, the cases applying the *Garner* rule provided fair warning to Deputy Cox that his conduct violated Vaughan's constitutional rights.

Pet. App. 5 (emphasis added; internal citations/quotations omitted). Once again, petitioner's real argument is that the Eleventh Circuit erred in applying established principles of qualified immunity to the facts of this case. Petitioner seeks to use this Court as a court of error, not a court of certiorari.

Moreover, the Eleventh Circuit not only applied the correct law, but applied it correctly. There is nothing erroneous, let alone cert-worthy, in holding that a law enforcement officer could reasonably, even if mistakenly, conclude that shooting to disable the truck or the driver was constitutionally permissible under the facts of this case. *Garner* permits the use of deadly force "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm . . . to others." 471 U.S. at 11.[4] Here the circumstances of the case, most notably

[4] Petitioner asserts that *Garner* permits the use of deadly force only if the suspect threatens the officer with a weapon, or there is

(Continued on following page)

petitioner's own testimony, permitted a reasonable law enforcement officer to believe that the truck posed a threat of serious physical harm – even death – to other motorists in its path.

In reality, petitioner urges this Court to go well beyond *Hope* and hold that the general requirement in *Garner* that a warning be given "where feasible" is *always* sufficient, without further guidance, to put officers on notice as to whether a warning would be feasible in particular factual circumstances. This Court considered and rejected a strikingly similar argument in *Saucier*. There, this Court held that the general rule, set out in *Graham v. Connor*, 490 U.S. 386 (1989), that the use of "excessive" force is unconstitutional is not always sufficient, in itself, to put officers on notice of what force will be considered "excessive" in particular circumstances. As the *Saucier* opinion holds: "*Graham* does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts. This is the nature of a test which must accommodate limitless factual circumstances." 533 U.S. at 205.

> [T]here is no doubt that *Graham* . . . clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough. . . . The relevant,

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probable cause to believe that the suspect has committed a crime involving infliction or threatened infliction of serious physical harm. Pet. 16. Although *Garner* states that use of deadly force would be permissible in these two circumstances (assuming a warning, if feasible, had been given), the *Garner* holding is not so limited.

> dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted.*

*Id.* at 201-02 (emphasis added). *Garner*, like *Graham*, establishes broad outlines for the constitutional use of force, but its application to a particular situation may often be (as it is here) something as to which law enforcement officers could make reasonable mistakes.

### C. The Eleventh Circuit's opinion does not conflict with the opinions of other federal appellate courts.

Applying a scatter-shot approach, petitioner suggests that the Eleventh Circuit's opinion conflicts with opinions from other circuits. But these opinions merely find, on substantially different facts, that qualified immunity is inappropriate. None conflict with the Eleventh Circuit's opinion in this case.

In *Estate of Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993), the officer fired at a suspect who was driving towards him in a stolen cab. The Seventh Circuit held that the officer was not entitled to summary judgment on qualified immunity because, resolving all disputes in favor of the plaintiff, the fleeing cab was a threat to the officer only because he stepped directly into its path without necessity. There was no evidence or argument that the cab posed a threat to others. *Enyart* is a narrow holding, driven by the specific facts of the case, and does not conflict with the opinion below. And *United States v. Bradley*, 196 F.3d 762 (7th Cir. 1999) is markedly different than Vaughan's case because the suspect (who had rolled

through a stop sign) was driving at 25 miles per hour and posed no threat to anyone when the pursuing police officer shot him in the back.

*McCaslin v. Wilkins*, 183 F.3d 775 (8th Cir. 1999), neither helps the petitioner nor conflicts with the opinion below. There the officer shot the driver of a fleeing truck, but only *after* it had left the highway and rolled down an embankment. The Eighth Circuit held that the officer was not entitled to qualified immunity because, construing the evidence in favor of the plaintiff, the truck did not remain a threat to anyone after leaving the highway. The Eighth Circuit distinguished its earlier decision in *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993), in which "an officer used deadly force to stop a renegade truck driver, who was at the time still in the process of fleeing from the police on a busy highway." 183 F.3d at 779. *Cole* held that the use of force was constitutionally reasonable under those circumstances. Vaughan's case is like *Cole*, not *McCaslin*, and there is no conflict between the Eighth and Eleventh Circuits.

*Wilson v. City of Des Moines*, 293 F.3d 447 (8th Cir. 2002), likewise is of no help to petitioner. In that case, two police officers shot an unarmed suspect after the suspect had ceased fleeing and had turned to face the officers. The Eighth Circuit noted that, although the officers both stated that they thought the suspect was aiming a gun at them when he turned to face them, there were significant factual discrepancies between the two officers' testimony. Given that a jury could find that the officers' story was not credible, summary judgment on the issue of qualified immunity was not warranted.

*Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), *cert. denied*, 536 U.S. 958 (2002), also bears no resemblance to this case. There an officer fired a lead-filled "beanbag round" at the head of a person "who was walking at a 'steady gait' in his direction" but who "was unarmed, had not attacked or even touched anyone, had generally obeyed the instructions given him by various police officers, and had not committed any serious offense." 272 F.3d at 1275. Unlike this case, *Deorle* was not a case in which "the officer has probable cause to believe that the suspect poses a threat of serious physical harm . . . to others." *Garner*, 471 U.S. at 11. Nor does the legal analysis in *Deorle* conflict with the opinion below. The officer admitted knowing that the bean bag round was potentially lethal at the distance from which he fired, and a reasonable officer would have known from existing law that the use of lethal force was not justified under those facts. Under those circumstances, the Ninth Circuit appropriately declined to hold that the officer was entitled to qualified immunity simply because there were no published cases involving the use of lead-filled bean bag rounds. Nothing in this analysis conflicts with the Eleventh Circuit's opinion below.

In *Rosales v. City of Phoenix*, No. 99-17204, 2001 U.S. App. LEXIS 27599, at *3 (9th Cir. Dec. 26, 2001), *cert. denied*, 123 S. Ct. 109 (2002), the Ninth Circuit not surprisingly affirmed the denial of summary judgment where the officers shot a fleeing suspect in the back, but admitted that they "did not consider [him] a fleeing felon," that he "never turned and aimed his gun at them," and there was no evidence that he posed a threat to others. In *Bray v. County of San Diego*, No. 93-55446, 1994 U.S. App. LEXIS 4289 (9th Cir. Mar. 2, 1994), the Ninth Circuit

affirmed the denial of summary judgment on a qualified immunity defense where the officer fired as the suspect was backing his truck towards the officer's patrol car in a parking lot from a distance of ten feet. Under those facts, the officer had no reasonable basis to fear for his own life or safety, and the case did not involve any threat to others.

There is similarly no conflict between the opinion below and *Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998), which arose from the 1992 events at Ruby Ridge. The Ninth Circuit affirmed the denial of qualified immunity with respect to the "Special Rules of Engagement" formulated for Ruby Ridge, which allegedly included the authorization to shoot on sight any adult male in the vicinity of the Weaver Cabin, regardless of any threat he posed. 126 F.3d at 1202. Taking this allegation as true, the Ninth Circuit held that it was clearly established that those Special Rules of Engagement did not comply with *Tennessee v. Garner*. *Id.* The only specific shooting examined by the Ninth Circuit is not analogous to Vaughan's case. The agent shot as the plaintiff was running back to the cabin and was not making an aggressive move of any kind. *Id.* at 1202-03. At this point, the officer and his fellow agents "were safely ensconced on the hill overlooking the Weaver cabin." *Id.* *Harris* does not conflict with the opinion below.

Petitioner also asserts that the Eleventh Circuit's opinion conflicts with opinions holding that whether the force used by a state actor was "excessive" is a jury question. *See Barlow v. Ground*, 943 F.2d 1132 (9th Cir. 1991); *Posr v. Doherty*, 944 F.2d 91 (2d Cir. 1991); *Dixon v. Richer*, 922 F.2d 1456 (10th Cir. 1991). None of these cases conflicts with the Eleventh Circuit's opinion here, because

the Eleventh Circuit's opinion here expressly acknowledges that a jury could find that the force used was unconstitutional. As discussed above, the Eleventh Circuit's holding that Deputy Cox is entitled to qualified immunity is based on the analytically distinct determination that, while Deputy Cox's belief that his conduct was constitutional might have been mistaken, his mistake was a reasonable one.

In sum, the cases cited by petitioner simply deny summary judgment under facts materially different than those at issue here. Instead of demonstrating any conflict among the circuits, these cases simply emphasize the factually intensive nature of the qualified immunity defense.[5]

### D. No issue of "great importance" is raised by the Eleventh Circuit's determination that state and local police procedure standards did not establish constitutional minimums in this case.

In his final argument, petitioner suggests that the Eleventh Circuit should have deferred to local, state, and

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[5] Petitioner also argues that the Eleventh Circuit "refused" to look outside its own Circuit for a "consensus of persuasive authority" that could amount to "clearly established law." Pet. 23. Petitioner, however, never pointed to any "consensus of persuasive authority" from other jurisdictions in this case. To the contrary, the available authority from other jurisdictions was at best mixed, with the closest cases supporting a finding of qualified immunity. *See, e.g., Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992); *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993). The Eleventh Circuit had no need to determine in this case whether a "consensus of persuasive authority" could amount to "clearly established law" for qualified immunity purposes.

national standards of police practice which allegedly prohibited Deputy Cox's conduct. Petitioner, however, has never established that the police procedure guidelines on which he relies were designed to reflect constitutional minimum standards of conduct. To the contrary, police departments and advisory organizations adopt policy guidelines for a variety of purposes, including protection of public and officer safety and even good public relations.[6] Absent some evidence that the specific standards at issue reflect constitutional minimums, it would be inappropriate to rely on those standards to determine whether Deputy Cox had "fair warning" that his conduct was *unconstitutional* (as opposed to merely being in violation of a departmental rule). The Eleventh Circuit committed no error, and certainly no error worthy of a grant of certiorari, in declining to treat the police procedures cited by petitioner as if they controlled the constitutional question.[7]

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[6] The police regulations cited by petitioner are distinguishable from the Department of Justice Report cited in *Hope*, because the record in *Hope* indicated that the Department of Justice Report was aimed specifically at redressing constitutional violations in Alabama's prison system. *See Hope*, 536 U.S. at 744.

[7] Petitioner seems to be seeking a holding from this Court that any violation of a police procedure or guideline is *necessarily* a violation of a clearly-established rule of constitutional law. Such a holding would not only be a drastic and unwarranted expansion of the holding of *Hope*, but would also restrict police departments in their ability to set procedures and guidelines that exceed constitutional minimums.

## CONCLUSION

In the opinion below, the Eleventh Circuit applied correct principles of qualified immunity law in a manner that does not warrant review on certiorari. The writ should be denied.

Respectfully submitted,

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